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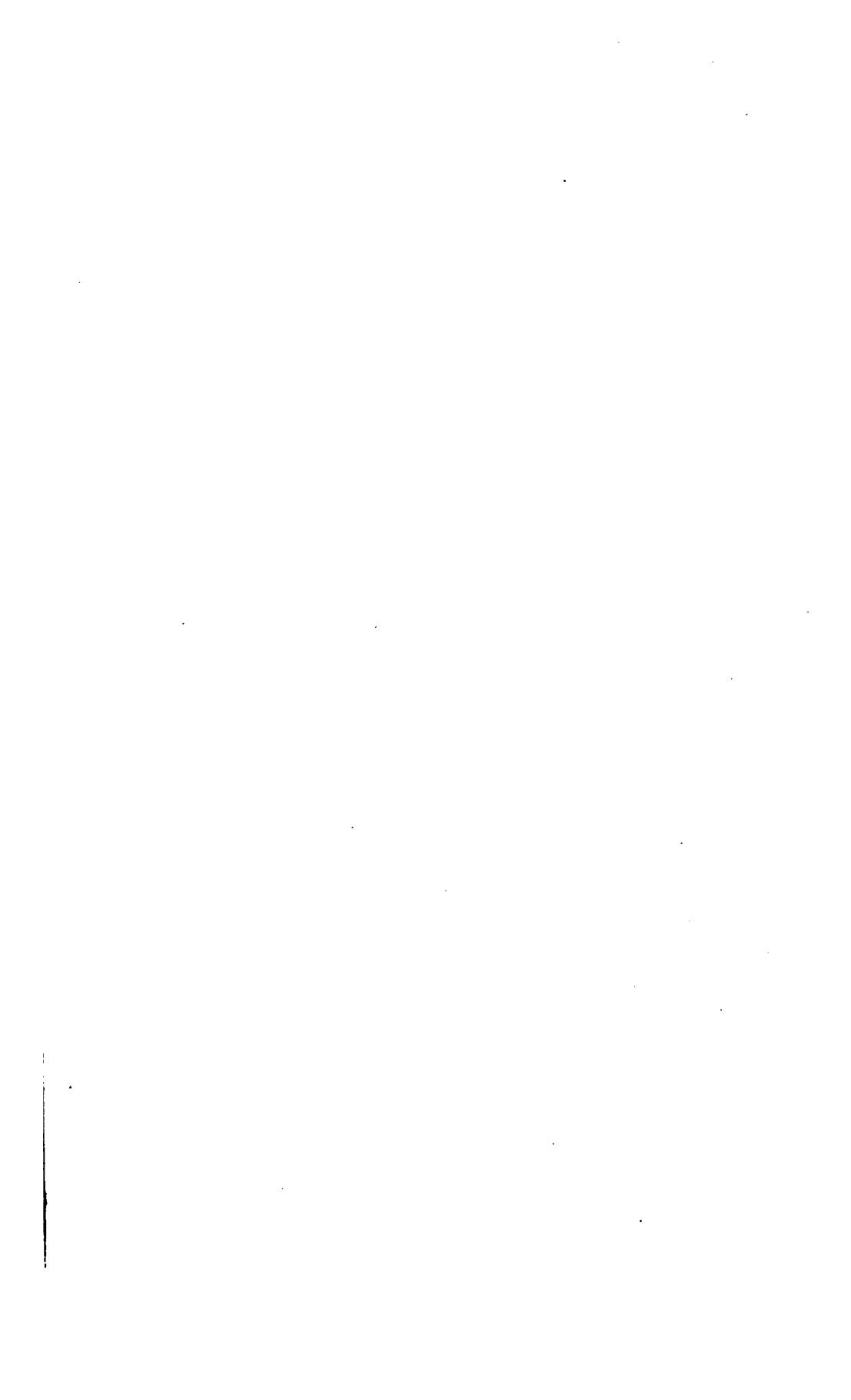
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AN
ESSAY
IN A COURSE OF LECTURES
ON
ABSTRACTS OF TITLE;
TO FACILITATE THE STUDY,
AND THE APPLICATION
OF THE FIRST PRINCIPLES,
AND
GENERAL RULES
OF THE
LAWS OF PROPERTY;
STATING IN DETAIL,

*The Duty of Solicitors in preparing, &c. and of Counsel in
advising, on Abstracts of Title.*

By RICHARD PRESTON, Esq.
BARRISTER AT LAW.

VOL. II.



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TO

THE RIGHT HONOURABLE

SIR THOMAS PLUMER,

MASTER OF THE ROLLS,

THIS VOLUME IS INSCRIBED,

BY THE AUTHOR,

AS A TRIBUTE OF SINCERE RESPECT AND ESTEEM.

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ON THE
LAWS OF PROPERTY
AS APPLICABLE TO
ABSTRACTS OF TITLE.

ON TITLES.

Under Tenants for Years.

THESSE Tenants may assign their terms, or make under-leases, or encumber the land with rent-charges, or any like charges. Such rents must necessarily be *chattel interests*, though limited for the lives of the grantees.

And therefore if lessee for years grant to another a rent out of the land, for the life of the grantee, this is a good grant during the term, if the *grantee* so long live; for this grant shall be taken strong against the grantor, and shall not be void, when, by any construction, it may be good (*a*).

(*a*) *Butt's case*, 7 Rep. 23.

So if lessee for years grant land to another for the term of *his life*, the grantee hath the whole term ; but with this collateral determination, if the grantee live so long (*b*) ; and the construction is in this respect the same on a deed as on a will (*c*):

And a rent-charge for life as a freehold interest cannot, in point of estate, exist by force of a title under a term of years (*d*).

And the same rent cannot be a *freehold* interest as to some lands, and a chattel interest as to other lands (*e*) ; or, as lord Coke expresses it, “*One entire rent cannot be a freehold out of black acre, &c. and a chattel out of white acre.*”

But a rent may be a freehold interest, as a charge issuing out of freehold lands, and at the same time confer a charge, by way of distress, on lands held for years (*f*).

The better opinion is, that a *judgment* is not a lien on the term itself; but that the term is bound only from the time at which the writ of execution is delivered into the sheriff’s office, (*g*); but an equity of redemption of a term is not bound by execution (*h*). Mr. Serjeant *Hill* gave an opinion, that the creditor had a right to sue an *elegit*, and that on an extent,

(*b*) 7 Rep. 23. (*c*) Ibid. (*d*) Ibid.

(*e*) Ibid. (*f*) 7 Rep. 23 b.

(*g*) *Burden v. Kennedy*, 3 Atk. 379, 29 Car. 2. c. 3.

(*h*) 3 Atk. 379; *Lyster v. Dolland*, 1 Ves. Jun. 431.

the title of the judgment creditor, would (as in the case of freehold lands,) have relation to the time when the judgment was docketed. This opinion has not been followed in practice.

A sale of a term by the king's debtor, before the term is extended, is good against the crown, unless the sale can be impeached for *fraud* (*i*).

But if there be merely *a right of entry*, the term cannot be assigned till the estate has been revested by entry (*k*).

For it is an ancient maxim of the common law, that a right of action, or chose in action, cannot be granted or transferred to a stranger (*l*); and thereby, as lord *Coke* observes, "Is avoided great oppression, injury, and injustice." (*m*).

Whether the term be actually vested, or be limited by way of *interesse termini*, it is assignable (*n*). But a person who has a contingent interest under a term cannot, it should seem, (*sed quære*,) assign the same at law; nor is a term held under a *legal* title, and limited by way of executory bequest, assignable at law, so far as it is placed in an executory state (*o*). Contingent interests under terms and executory

(*i*) *Sir Gerard Fleetwood*, 8 Rep. 171.

(*k*) *Stevens v. Hanham*, 3 Lev. 312, 4 Mod. 48.

(*l*) 1 Inst. 266 a. (*m*) *Ibid.* (*n*) 1 Inst. 46. *Perk.* § 91.

(*o*) *Lampet's case*, 10 Rep. 46; *Manning's case*, 8 Rep. 94.

interests, and terms reduced to the condition of a right of entry, may be released (*p*).

And assignments of terms under a title, depending on a contingent or executory interest, will, when they are made for a valuable consideration, be supported in equity.

When a term is bequeathed to *A* during his life, and after his death, to *B*, the interest of *B* during the life of *A* is executory.

In point of law, *the whole term* is in *A*, determinable by his death; and if *B* release to *A*, *A* will have the term absolutely; and if *A* assign to *B*, *B* will have all the term absolutely (*q*).

And if *A* and *B* join in an assignment to a purchaser, the assurance will amount to an assignment of the term by *A*, and to a release of the possibility by *B*.

Had the term been for one hundred years, and the gift been to *A* for fifty years, if *A* or if *B* should so long live; and after the determination of that estate, then to *C* for the residue of the term; then each donee, whether the gift was by deed or will, would have a legal estate (*q q*).

In this instance, the estate of A is measured, and is a new term; while in the other instance it could not be ascertained how many of the years, as distinguished from the residue of the term, were to belong to A .

(p) Lampet's case, 10 Rep. 46; Manning's case, 8 Rep. 94.

(q) Ibid.

(99) Plowd. 524.

And in a deed of grant, except so far as it is by way of trust, a limitation over cannot be made after a term of years, or other chattel interest, has been granted to *A* for his life, or for the life of *B*.

An executory interest in chattels real, is also transmissible to executors or administrators, and may be bequeathed. It may also pass by the bargain and sale of commissioners of bankrupt.

It is frequently important to consider whether the assurance of a tenant for years amounts to an *assignment*, or is only an *under-lease*.

The mere reservation of rent will not, as was once supposed, cause the assurance to be considered as an under-lease. Every deed which passes all the time or estate of the termor, either in all or in a part of the lands, will amount to an assignment of the lands which are comprised in the assurance (*r*).

And a grant for a less portion of time than the whole term, either by excepting the last day of the term, or by limiting a term which may, or necessarily must, determine before the end of the original term, will be an under-lease (*s*).

From the case of *Jermyn v. Orchard*, (*Shower's Parliament Cases* (*s s*)), and from the language of some of the other Reports in which that case is to be found, it might be inferred that an assign-

(*r*) 2d Vol. *Practice of Conveyancing*, p. 124.

(*s*) *Ibid.* (*s s*) 199.

ment must necessarily pass all the interest of the termor; so that an assignment to commence from a future day, or on an event, would be void.

On principle, it would be perfectly correct that no assignment should be good unless it created an immediate tenancy, in other words, privity between the assignee and the reversioner or remainder-man. But *Jermyn v. Orchard* is not to be relied on as an authority, that an assignment is void, merely because it is to commence in interest from a future day, or upon an event.

There are cases (*t*) which admit that a grant of lands held for a term, to commence from a future day, or upon an event, is good; as, if lessee for years grant to *A*, that if *I. S.* die, *A* shall have his term, this is a good grant; and yet the term is to pass on a contingency, and the grant is suspended in operation in respect of vesting the estate, until the contingency arise. So if one grant to another, that if he can obtain the good will of the lessor, he shall have the grantor's term, then if he perform the condition he shall have the term, otherwise not.

And though, by the words of the *habendum*, the term may be limited from a future day, yet if the assignment contain a grant of all the estate, &c. these words will pass all the time of

the term, and the *habendum* will be deemed repugnant, and rejected (*u*).

But when the clause of grant is carried on with a connection, so as to grant the term *in futuro*, or at least after the death of a person, as, if lessee grant his term after his death, the grant has been deemed void.

The technical reason of the invalidity of a term, assigned to commence after the death of *A*, may be the legal notion, that the life is of longer presumable continuance than the term. It is difficult on any other ground, or even on that ground, to reconcile the authorities.

It is quite clear that every tenant, except a tenant in tail, or of a chattel interest, may *create* a term of years to commence even after his own death (*u u*).

The material distinction between *an assignment* and *an under-lease*, is, that *an under-lease* leaves *a reversion in the termor*. It must be the ultimate part of the term, so that the only privity may be between the termor and his lessee.

For this reason the original lessor or his assignee cannot maintain any action upon covenants; or bring any action of debt, founded on the privity of estate, against the underlessee, or any person claiming under him.

Another consequence is, that the underlessee cannot surrender to the original lessor. He must surrender to his immediate lessor (the

(*u*) *Jermyn v. Orchard*, Show. Parl. Cases 207.

(*u u*) *Plow. 524.*

termor,) or his assignee. Nor is such under-lessee capable of a release by enlargement from the original lessor (*v*).

Sometimes also a question arises whether the instrument amounts to a lease, or is merely a *contract* for a lease. The leading authorities on this point are Shep. Touch. 270; *Bagster v. Brown* (*w*); *Goodtitle dem. Estwick v. Way* (*x*); *Doe dem. Coore v. Clare*, Lady Montague's case (*y*).

The distinctions afforded by these cases will be drawn in the fourth volume of the *Practice of Conveyancing*, in the chapter on assignments of terms of years.

In considering titles depending on leases or other assurances, either for lives or years, several points are to receive attention.

1st, *As to the Title of the Lessor.*

When Leases are granted by corporations, ecclesiastical persons, &c. it is neither the practice, nor does it seem necessary, to require any evidence of the title of the lessor.

Whether in other and ordinary cases a purchaser had a right to require the seller to produce evidence of the title of the lessor, was for a long period, a point on which a great diversity of opinion was entertained by the profession (*z*).

(*v*) 2d Vol. *Practice of Conveyancing*, p. 352.

(*w*) 2 J. Black. Rep. 973.

(*x*) 1 Term. Rep. 732. 2 Term Rep. 739.

(*y*) Cro. Jam. 301; Bulstr. 190. (*z*) 1 Vol. p. 13.

UNDER TENANTS FOR YEARS. g

The present practice, and the authorities, lean towards requiring evidence of the title of the lessor; and it was always agreed, that when the lease was made under a power, either in an act of parliament, or in a private conveyance, the title, as far as it was connected with the power, must be stated. Even a person who contracts for a lease has a right to the inspection of the title of the intended lessor (*a*).

2dly, *The Duration of Interest, &c.*

Care must also be taken to see that there exists under the lease that duration of interest which is professed to be granted; and that this interest is, in point of title, or collateral determination determinable by those means only, or at that time only which is stipulated between the parties.

3dly, *The Rent, &c.*

Care should also be taken that the rent is only of that amount which is stated in the contract, since an increase of rent would diminish the value of the purchase.

4thly, *The Tenant Right, &c.*

Also, that there is not any existing tenant right which can affect the title with a trust.

On this subject, Mr. Butler's notes on trusts

arising from tenant-right, and the case of *Lee v. Vernon*, (*a a*) and the arguments of that case, will be read with particular advantage and great satisfaction. The late case of *Nesbitt v. Tredennick*, in Ireland (*b*), is in unison with the general tendency of the decisions in England. It proceeds on the ground, that, as the leasehold interest was forfeited absolutely to the mortgagee, so was the benefit under the renewed lease. And in this place it is to be observed, that a lease in consideration of a surrender of a former lease, is implied notice of the lease, and leads the purchaser to an investigation of the intermediate title, and consequently the examination of all prior leases and mesne assignments (*c*).

In such instances therefore it is obvious that the evidence of the title should be traced for a considerable period; and in some cases, and such is the practice, even for sixty years or more, so as to show that there is a good title in equity as well as at law.

5thly, *The Surrender, &c.*

Also in titles depending on leases by ecclesiastical persons, &c. it is essential that the old lease should be surrendered, &c. before the new lease is granted; or should be surrendered, in point of law, by the acceptance of the new lease; or should be surrendered, ended, or

(*a a*) 7 Bro. Par. Cases 432. (*b*) 1 Ball and Beatty 29.
 (*c*) *Coppin v. Fennyhough*, 2 Bro. C. C. 291.

determined, within a year from making the lease (*d*). Many titles are defective for want of attention to these particulars.

The surrender is frequently taken from the *cestui que* trusts, instead of being from the legal tenant. This is erroneous.

Sometimes, also, no actual surrender is made; and the new lease, instead of being granted, as it ought to be, to the legal tenant, under the former lease, is granted to the *cestui que* trust; so that there is not any virtual surrender of the subsisting lease.

This is also a defect, unless there be an actual surrender by the legal termor; and whenever the defect occurs, and remains material to the title, all persons concerned in interest at law and in equity, at least at law, should assist in completing the title, and in making an effectual surrender, and in obtaining a new lease.

But such defective leases, though voidable by the successor, are good against the lessor himself; and eventually a title which was defective on this ground, may become good by the acceptance of a new lease, when the title is so circumstanced, by effluxion of time, or by a subsequent surrender, &c. that it is free from the objection which existed at the date of a former lease.

6thly. Merger, &c.

Terms, like all other particular estates, are liable to merger in the estate next in reversion or remainder.

Whenever it may be necessary to apply the learning of merger, the 3rd volume of the *Practice of Conveyancing* will afford material information.

These leading points should be kept in mind :

1st. A legal estate cannot merge in an equitable estate ; but sometimes an equitable estate may be extinguished in the legal estate.

2dly. A remainder or reversion cannot merge in a prior particular estate ; but the prior particular estate must, if any merger take place, be absorbed by the reversion or remainder.

3dly. The better opinion is, that one term may merge in another, although the term in reversion or remainder be for fewer years than the term comprised in the prior estate.

4thly. A term which a person has as executor, administrator, or in right of his wife, will not merge in the freehold or inheritance which he had before the term became vested in him by such act of law. Nor will a term so held in another's right be merged by a subsequent descent of the reversion or remainder (e).

(e) *Platt v. Sleep*, Cro. Jac. 275.

But a purchase of the reversion or remainder by a person having a term in another's right, will occasion a merger of the term, even though the purchaser be a trustee of the term.

5thly. The term will merge as to that part or share only in which the same person has the reversion or remainder, and also the term. So that if he have the term in the entirety of the lands, and the reversion or remainder in one third part of the lands, the term will merge as to one third part only.

6thly. Although the term, and the reversion or remainder, be limited by the same deed or will; as to *A* for years, remainder to *A* for life, the term will merge, except in particular cases; as, where *A* is tenant for the life of *C*, remainder to *A* and *B* for life: in that case, on account of the joint-tenancy, the estate for the life of *C* will be protected (*e e*). But the same person may be tenant for life, with remainder for years (*f*).

A made a mortgage for a term of 500 years, and afterwards another mortgage for a like term. Both the mortgages were satisfied, and the terms were assigned to distinct trustees; one term to each trustee, upon trust to attend the inheritance. Some time afterwards the owner of the fee took an assignment of the first term with an intent to merge it, or have it surrendered; but it was held that the merger was

(*e e*) *Wiscot's case*, 2 Rep. 60.

(*f*) 1 Inst. 54 b.; 3 *Practice of Conveyancing*, 44, 45.

prevented by the intervention of the other term outstanding in another person (g).

This case shows how cautious the conveyancer should be in surrendering a term. The surrender should be to the person having the next immediate estate in remainder or reversion. This cannot always be done with certainty, for want of knowledge of the precise state of the title; and it seems advisable in those cases, to make the surrender by deed-poll, and generally to the person or persons then having the next immediate estate in remainder or reversion. In this mode, the term would, it should seem, be effectually extinguished.

The practice of using words of assignment as well as of surrender is even still more eligible and safe.

7thly, *Succession.*

In investigating titles under leases, it is also necessary to be satisfied that the right by succession or transmission is consistent with the rules of law, and the nature of the title.

These points will be examined under the heads of Titles under Heirs, Special Occupants, General Occupants, Executors and Administrators.

8thly, *Renewals, &c.*

Under the head Tenant Right, some points connected with the learning of renewals are

(g) *Whitchurch v. Whitchurch*, 2 P. Will. 236.

noticed. Others will be noticed under the head Surrenders, &c.

The general rule is, that renewed estates are subject to the same uses, or rather trusts, as the estates which existed under the old leases.

By different acts of parliament, incapacitated persons are, under certain circumstances, and in certain modes, enabled to renew and make surrenders for the purpose of renewal.

Frequently by wills, &c. lands held for freehold leases are limited by way of strict settlement.

With a view to future renewals this is highly improper; since, in the case of a limitation to A for life, with limitations over to his unborn sons, with an interposed remainder to trustees for preserving remainders, no effectual surrender can be made unless by an act of parliament, or the decree of a court of equity, sanctioning the act of a trustee to destroy the contingent remainders.

To avoid all difficulty on this subject, the legal estate should be vested in the trustees to renew, &c., and to raise fines, &c., and subject thereto, the equitable ownership should be settled; or at least if the legal estate be limited to the beneficial objects of the settlement, a power by way of use should be given, enabling the trustees to surrender, &c. mortgage, &c.

And as the absence of a trustee may prevent

either an actual surrender, or an exercise of a power given to several persons jointly, a power might be so penned as to authorize the exercise of it by such of the trustees as may be in England, and not under any incapacity to surrender.

The learning respecting terms of years &c. is of essential importance to titles, since the property held under leases and terms of years, and other chattel interests, is of immense value ; and the practice of keeping terms on foot to attend the inheritance, renders this learning still more extensively useful. In the *Essay on the Quantity of Estates* a summary of the learning respecting the constituent parts of terms of years will be found. The subject should be pursued in *Bacon's Abr.* chap. Leases, and chief baron *Comyns's Digest*, title Estates ; and the learning respecting attendant terms is collected in *Comyns's Digest*, Chancery (*h*) ; in Mr. *Butler's Annotations on Coke on Litt.*, and by Mr. *Sugden* in his *Venders and Purchasers*. The rules of law and practice, applicable to the assignment of terms and of attendant terms, will be inserted in two chapters of the fourth volume of the *Practice of Conveyancing*.

In reference to terms of years, the more prominent points to be considered are,

- 1st, The right of the lessor to lease.
- 2dly, The capacity of the lessee to receive the lease.

- 3dly, The right or ability of an assignee to assign the term.
- 4thly.. The capacity of an assignee to receive the term.
- 5thly. The deduction of the title under the term.
- 6thly. The accuracy of the words descriptive of the parcels.
- 7thly.. The competency of the words of limitation in the lease, or in the assignment.
- The law respecting the date of the lease ; the commencement of the lease ; the duration of the lease ; the mode of computing the time of duration or continuance, next present themselves for consideration.

To dilate on all these heads would be to waste the time of the student, and withdraw his attention from those works which contain ample information on the subject.

A general outline will be found in the Essay on the *Quantity of Estates*. However a few points of contrast will be useful.

1st. Leases for lives confer freehold interests ; leases for years, or for years determinable on lives, are chattel interests.

2dly. Leases, and other assurances limiting estates for lives, must be measured by the life or lives of a person or persons in being at the date of the grant, &c. or by some event connected with a life or lives in being, as widowhood, &c. The like observation is applicable to copyhold grants for lives ; and each grant

must pursue the custom, and be of the entire tenement at the ancient rent, customs, &c.

3dly. Terms of years may be either absolute, or with a collateral determination.

They may be, and frequently are, determinable on a life or lives. This collateral determination may be marked by the life or lives of a person or persons to be born, as well as of a person already born ; as, if *A* and *B*, or either of them, should so long live ; or if *A* and *B*, and their first son to be hereafter born, or any or either of them should so long live.

4thly. A lease to *A*, for the life of *A* and *B*, gives an estate while they and the survivor of them shall live.

A lease to *A*, while *A* and *B* shall be justices of the peace, or shall be resident in Norfolk, will determine on the death of *any one* of them ; or when either of them shall cease to be a justice of the peace, or to be resident in Norfolk.

A lease for years, if *A* and *B* shall so long live, will determine when either of them shall die. Hence the practice to add, when the intention requires it, “ If they or either of them should so long live.”

5thly. At the common law, leases for lives, of lands in possession, must be completed by livery of seisin, or made by lease and release, &c. Estates for lives under powers, may be, indeed ought to be, created without livery.

When livery is made, it is not of any avail.

Leases for years may be created without

livery, unless they be of the *reversion*. They might, by the common law, be created without writing; and now may be created by parol, with writing, evidencing the contract; and *reversionary* or future leases may be created in like manner.

But a lease of the reversion passing the estate and the services immediately to the lessee, cannot be created without a grant, and a grant cannot be effectual without a deed.

6thly. By the common law, estates of freehold cannot be granted to commence *in futuro*. Leases for years, unless they be under a power, or some enabling statute, requiring the lease to be in possession, may be limited to commence from a time to come, or on an event.

And, under the learning of executory devises, and springing uses, estates to commence *in futuro* are good.

So trusts and estates in rents, &c. on the creation thereof, may be granted by deed or will, to commence *in futuro* (*h h*).

7thly. By the common law, leases, except a lease from an infant, may be good with or without any reservation of rent; while leases under powers, or enabling statutes, must, in this and every other respect, conform to the power.

8thly. Though in the limitation of terms of year there must be words, marking with certainty, either in expression, or in construction, the duration or continuance of the terms;

(*h h*) *Essay on Estates, chap. Freehold.*

and in leases for lives there must be a certainty of the lives; yet in the assignment of lands held for lives, or for years, all the estate may pass by words of grant, without any words of limitation to heirs, or to executors, or any words expressive of time.

This observation is applicable to deeds as well as wills.

9thly. Freehold estates for lives in lands, and of the legal estate, must, however created, be transferred by livery of seisin, or by lease and release, or other mode which is equivalent; while estates in lands, under terms for years, may be transferred by mere writing, except they confer a title to the reversion and services; and under such circumstances there must, it is apprehended, be a grant, or assignment by deed.

An end may be put to a term of years by extinguishment thereof in the reversion or remainder; that is by a surrender of the term. (i).

An *interesse termini* cannot, in point of legal form, be surrendered; nor enlarged by re-lease or confirmation (k). It may be re-leased; of course it must be by deed; and a deed importing to be a surrender may operate as a re-lease. This interest may be assigned (l); it is transmissible to executors (m); or it may, as well as an

(i) *Shep. Touch.* chap. Surrender.

(k) 1 Inst. 46 b. 270 a. 296 a.

(l) 1 Inst. 46 b.

(m) *Ibid.*

actual term, be *virtually* surrendered by the acceptance of another term of years, or other estate, incompatible with that interest.

Merger is another mode of extinguishing a term of years.

And a term of years may be defeated by a *condition*, or a proviso of *cesser*.

It is frequently necessary, in the investigation of a title, to ascertain that the condition or proviso of *cesser* has operated ; in other words, that the events have happened.

The surrender of a term which has been long dormant is sometimes presumed (*n*).

The late case of *Doe d. Graham v. Scott* (*o*) has induced great caution in relying on the presumption of the surrender of a term. Of a term which has been assigned to attend the inheritance, unless the title to the inheritance has been in opposition to the trust declared of the term, no surrender will be presumed ; and no less time than twenty years will raise the presumption that a mortgage term has been surrendered (*p*) ; and the late decision in *Cholmondeley v. lord Clinton and others* (*q*), has, if right in principle, greatly shaken the confidence which, in practice, used to be placed on such presumption.

(*n*) *Doe v. Sybourn*, 7 Term Rep. 2; *Goodtitle v. Jones*, 7 Term Rep. 47.

(*o*) 11 East 478.

(*p*) *Doe v. Calvert*, 5 Taunton 170.

(*q*) 2 Merivale 171.

When the possession has been adverse against the inheritance, and against a term of years carved out of the inheritance, the title obtained against the termor by adverse possession will protect the possession against ejectment, though the seisin may be regained in a real action by the owner of the inheritance. But according to lord *Coke* (r), "if lessee for years be ousted, and he in the reversion disseised, and the lessee re-lease to the disseisor, the disseilee may enter, for the term of years is extinct and determined"; and lord *Coke* further observes, "But otherwise it is in case of a "lessee for life; for the disseisor hath no term "of years whereupon the lease of lessee for "years may enure." (s)

When a term of years is in two joint-tenants, an assurance by one of them will not pass more than his moiety or share; yet one of several executors or administrators may assign the entirety of the lands, or demise them for all or any part of the term (t).

And an assignment purporting to be from several executors, and executed by one only of them, will be effectual for the entirety.

This point was once doubted. It was afterwards treated in practice as the opinion most consistent with the nature and office and power

(r) 1 Inst. 273 b, and 273 a.

(s) 1 Inst. 273 a.

(t) Shep. Touch. 484.

TENANTS BY STATUTE MERCHANT, &c. 23
of an executor. And the point was lately considered, and so ruled by *Ch. J. Gibbs*, at *nisi prius*, and so decided in Chancery.

*Of Titles under Tenants by Statute Merchant,
Staple, &c.*

TENANTS by *statute merchant*, *staple*, *elegit*, &c. have, in point of law, an interest measured by the quantum of their debt ; but in equity they have merely a security for money.

Their interest is of a *chattel* quality, and not of freehold tenure ; though by the special provision of the acts of parliament, under which their interests originated, tenants under statutes merchant and of the staple may maintain an *assize*, which is by the common law a remedy proper to an estate of freehold.

If the debt be 100*l.* and the extended value be 5*l.* per annum, the estate will continue to the end of twenty years ; but the estate may determine at an earlier period by casual profits ; and the account may be taken at law on the writ *venire facias ad computandum*.

At law, the extended value only is regarded, and this value is generally far below the actual value, so as to make an allowance for the loss of interest, &c.

But in equity, the estate is considered merely as a security for the debt, interest and costs ; and the estate of this tenant may be redeemed like a mortgage, on payment of the principal,

interest, and costs ; and the account will be taken according to the actual, and not the extended, value (*u*). Whether there be any limit of time, after which a court of equity will not administer this relief, is a point on which no decision has been found.

These interests being of a chattel quality, may be assigned as other chattel interests, without livery of seisin, or may be bequeathed by will as personal estate ; and on the death of the tenant they will devolve to his executors, or other personal representatives, or pass to a legatee by bequest, and assent to that bequest.

The estate may be in reversion, or in possession ; and one estate of this description may, it should seem, merge in another estate of the like description (*x*).

And certainly it may merge in a term for years, or any estate of freehold ; and it may be surrendered to the person who hath the next estate in reversion or remainder (*y*).

A person who buys an estate of this description must consider it rather in the nature of a mortgage and consequently redeemable, than as an actual and absolute ownership.

The like observations are for the most part applicable to the estate of *executors*, and *trustees*,

(*u*) *Marsh v. Lee*, 2 Vent. 338.

(*x*) *Dighton v. Grenville*, Ventris 231 ; Collis's Parliamentary cases, 64.

(*y*) 3d vol. of the *Practice of Conveyancing*, pp. 177, 195.

who hold lands till *debts are paid*; for their estates will determine when the debts are paid. In the case of a tenant by statute, &c. the estate will not determine except there be a judgment on the writ *venire facias ad computandum*, ascertaining that the debt is satisfied (*z*).

Under the same description may be classed the estates of persons who hold *quousque*, as in the instance of rights of entry, granted by annuity deeds, and by conditions of re-entry, in which the feoffor, &c. is to hold till, &c. (*a*).

Some of these interests devolve to the heir; but when they attach and become vested they are chattel interests (*b*).

Under Tenants at Will.

AT this day tenancy at will cannot arise without express grant or contract. All general tenancies, with the exception of the tenancy of a mortgagor, under his mortgagee, and of a *cestui que* trust, under his trustee, are, by implication, and constructively, from year to year.

A mortgagor, or a *cestui que* trust, though accounted for many purposes, a tenant at will, is so by implication only, and in a secondary sense. Such tenancies from year to year may devolve to the executors or administrators, or may be assigned.

(*z*) *Shep. Touch.* 358.

(*a*) *Jemott v. Cowley*, 1 *Siderf.* 344; *Sir Tho. Raym.* 135.
Litt. sec. 327.

(*b*) *Jemott v. Cowley*, 1 *Siderf.* 349.

An actual tenant at will has not any assignable interest. His interest, however, admits of an enlargement by release (*c*).

Under Copyholders.

FOR some purposes a *copyholder* is considered as tenant at will.

He has a tenancy, so far that his estate may be enlarged and converted into a freehold interest by re-lease of the lord (*d*). In all other respects the duration of his interest depends on the extent of the customary grant, and the custom of the manor. He will be tenant in fee, in tail, or for life, according to the form of the grant ; and, informal words, warranted by the custom, may pass the inheritance, as a grant to a man to hold *sibi et suis*. The copyholder cannot have a fee when the custom is to grant for life; but a custom to grant in fee warrants a grant to a man and the heirs of his body ; and a custom to grant to several successively for three lives warrants a grant to one person for three lives (*e*).

His alienation must be governed by the modes prescribed by the custom of the manor.

In general no estate can pass *inter vivos* without a surrender. As against an heir of a deceased tenant, a will, and a surrender to the use of that will, was necessary.

(*c*) Litt. sec. 460.

(*d*) 2d vol. of the *Practice of Conveyancing*, 284.

(*e*) *Smartle v. Penhallow*, 2 lord Raym. 994.

As to persons dying after the twelfth day of July 1815, the necessity of a surrender to the use of a will is superseded (*f*).

This statute will give occasion to a series of decisions involving numerous questions of great nicety.

Equitable estates may pass by contract, or by will, without any surrender to the use of the will. And if there be any estate tail, the customary mode of barring the entail must be observed (*g*).

This rule equally prevails when the estate tail is of the equitable, as when it is of the legal, ownership, except as to the equitable estate tail in particular cases, in which the tenant in tail has done every thing in his power to bar the entail, and has been prevented by fraud, or breach of trust in his trustees, from accomplishing his intention (*h*).

It is now agreed that the equitable tenant in tail of a copyhold estate may suffer an equitable recovery; and it should seem that the case of *Otway* and *Hudson* will be applicable only when the lord refuses to allow the equitable tenant in tail to suffer a recovery in the lord's court, and the trustees also refuse to make a surrender to the use of the *cestui que* trust, as tenant in tail, so as to give him a

(*f*) Statute of 55 Geo. III. c. 192.

(*g*) *Pullyn v. Middleton*, 9 Mod. 483.

(*h*) *Otway v. Hudson*, 2 Vern. 585; *Pullyn v. Middleton*, 9 Mod. 483.

legal estate tail, and qualify him to suffer a legal recovery in the lord's court.

In general a customary recovery is the proper mode of barring an entail of copyhold lands.

In some manors, however, the entail may be barred by a surrender; or a surrender to the use of a will; or by a forfeiture and re-grant; and two or more of these modes may be concurrent; so that either of them may be sufficient. And when lands may be entailed, it is of necessity, in intendment of law, that the entail may be barred; and it may be barred by a surrender to the use of a purchaser, or of a trustee, or even a surrender to the use of a will, unless some special mode of barring the entail has been prescribed by the custom of the manor.

Some manors do not admit of entails; and when no entail can be created of the legal estate, none can be created of an equitable estate; and therefore, an attempt to create an estate tail by way of trust, in lands which do not admit of an entail at law, will be nugatory.

Instead of aiming to create an entail, there should be special limitations of trust, adapted, as near as may be, to limit an interest, assimilated to the nature of an interest under an estate tail.

This may be done by way of trust for such

person or persons, as for the time being, within the period of certain lives, and twenty-one years, shall be seised of the freehold lands under or by virtue of the settlement made thereon, or any conveyance to be made, or fine levied, or recovery suffered thereof; so that the same, &c. may go, devolve, &c. to the same person, &c. or the copyhold lands may be directed and declared to be held in trust, &c. for *A* for life, with limitation to his first son; or his first son who shall attain twenty-one, or die under that age, leaving issue living at his death, for an estate in fee, with suitable limitations over; or to *A* and his heirs, and if he should die without issue living at his death, then over.

Limitations of copyhold lands, in the form of estates tail, are considered as conditional fees, when the lands do not admit of an entail.

For this reason, and also because certain hereditaments, not being tenements, are not entailable, the doctrine of *conditional fees* ought to form part of the study of the conveyancer.

In some manors, and the manor of *Dymock* in Gloucestershire affords an instance, the custom warrants grants to the tenant and the heirs of his body; so that no tenant has the fee-simple. Estates thus circumstanced give occasion to these and similar observations.

It should seem, that by the custom of this

manor the course of devolution must be to the tenant and the heirs of his body, with a right, through a customary conveyance or alienation, on the surrender to the lord, and a new grant, to alien to another and the heirs of his body. It should seem, also, that the descent will be to the tenant and the heirs of his body; and if the legal estate be descendible in this manner, the equitable estate must, it should seem, although this is doubtful, be descendible in like manner; and difficulties may arise in deciding whether this estate is a conditional fee at the common law, admitting of alienation in any other manner than to a new tenant and the heirs of his body; and also, whether the equitable interest will be descendible to a man and his heirs generally, while, by the custom of the manor, the legal interest is confined in its descendible quality to the tenant and the heirs of his body.

Though in general copyhold lands will not pass without a surrender, or other customary mode of alienation, yet even by the common law, a deed will, in some cases, be effectual to perfect the title; and in other cases deeds are made necessary by particular acts of parliament. Thus there may be a re-lease of a right by deed from a person who has a mere right or title, to a person who is in possession, and has obtained admission (*i*). Also, one of several

(*i*) *Kite v. Queinton*, 4 Rep. 25.

joint-tenants, or, it should seem, *coparceners*, may re-lease to his companions, and the tenant may re-lease to the lord, or the lord to the tenant. Also there may be a lease by deed, provided such lease be warranted by the custom of the manor, or by the license of the lord; and the estates of bankrupts pass by bargain and sale enrolled; and sales under the land-tax act are to be made in like manner.

But one tenant in common cannot re-lease to another. Each tenant in common is a tenant of a distinct tenement.

And although rights, &c. may be released by deed, they may also be released by surrender; and married women having rights, cannot release these rights by mere deed without a surrender; and therefore to bind the rights of a married woman there must be a surrender to give effectual operation to the re-lease.

So also equitable estates may pass by deed. They will also pass by any customary mode of alienation; and the owner of an equitable estate may, independently of the late statute, give his property by will, without a surrender to the use of the will. Such gift, by will, will be valid whether the testator has the trust, or an equity of redemption, provided the legal estate be out of him at the time of publishing his will (k).

(k) *Kenebel v. Scrafton*, 7 Ves. 497.

A copyholder, however, who retains the legal estate after a mortgage made by surrender, and before admission of the mortgagee, could not have devised the lands without a surrender to the use of the will. Nor will the will become operative by relation, as an admission of the mortgagee; thus changing the legal estate into an equity of redemption (*l*).

But surrenders will not operate by way of *estoppel*; and considerable difficulties may be experienced in finding any mode of assurance which will produce the effect of an *estoppel*.

When there is a contingent remainder in copyhold lands to a person not ascertainable, as to the survivor of several persons, or to persons who may answer a given description, there is not any effectual mode of barring this possibility without any interest.

So an expectant heir cannot bind his future interest by surrender (*m*); and though he becomes heir, the succeeding heir will not be bound by his contract before he was heir (*n*).

But all other interests of a contingent or executory nature, to a person ascertained, may, it is apprehended, be barred or extinguished.

A re-lease by persons adult, &c. not under coverture, will certainly extinguish their right.

(*l*) *Kenebel v. Scrafton*, 7 Ves. 497.

(*m*) *Goodtitle v. Morse*, 3 Term Rep. 365.

(*n*) *Morse v. Faulkener and others*, 1 Anstr. 11.

And on principle, it should seem that a surrender from husband and wife, entitled in right of the wife, will have the same effect as a fine. At all events there is reason to conclude that a common recovery by them will preclude all right on her part.

For it is absurd, and contravenes the policy of the law, that there should exist a right or title, coupled with an interest, without any means of barring that interest.

The maxims are, *unum quod dissolvi potest eo ligamine quo ligatur—nil tam conveniens est naturali aequitati quam voluntatem domini rem suam in alium transferre, ratam habere* (o); and it is submitted that the whole system of our laws proves that contingent as well as vested interests are within the principle and the reason of these maxims.

And though the exception in the case of a contingent interest in tail be admitted, this is in consequence of the statute *de donis*, and of the law applicable by analogy to copyhold lands, and not of the original rules of the common law.

There may be a special occupant of copyhold lands; but there cannot be a title by general occupancy (p).

On a grant to a man for three lives, the

(o) 1 Rep. 100.

(p) *Smartle v. Penhallow*, 2 Lord Raym. 994.

grant will determine on his death, unless the heirs be special occupants (*q*).

So if the fee be limited to *A* for the life of *B*, with remainders over, the estate of *A* will determine on his death, though *B* be living.

The lord will, it should seem, be entitled to hold during the life of *B* (*r*).

At least there are some instances in which the lord shall have the interest between the determination of one estate and the commencement of another estate (*s*).

Contingent remainders of copyhold lands do not admit of destruction by the surrender of a tenant for life.

But a remainder may fail, because the particular estate determines before the remainder can vest in possession.

And it is considered to be law, that a copyhold estate in fee, of the legal ownership, cannot be granted to commence *in futuro*.

Though there cannot be a general occupant of copyhold lands, yet the custom may prescribe the successor; thus the wife may be the *quasi* heir; as on a grant to one for the lives of three persons; the persons named as lives may by custom, but not without a custom, become the copyhold tenants (*t*).

And although the executors may not take at

(*q*) *Zouch v. Forse* 7 East 186.

(*r*) *Combe's case*, 9 Rep. 75.

(*s*) *Ibid.*

(*t*) *Right v. Bawden*, 3 East 260.

law, so as to become occupants, yet the equitable interest, under a copyhold grant for lives to trustees, will devolve to the executors, &c. of the *cestui que* trust, unless the heirs be entitled as specially named. Such equitable estates for lives admit of *quasi* entails.

And though equitable interests in copyhold tenements held for lives may be *quasi* personal estate, for the purposes of succession or transmission, yet it should seem, that a husband alone, or the husband and wife, except by a surrender, cannot alien this life-interest of the wife.

Tenant by Sufferance.

A Tenant, or rather a late tenant, occupying by sufferance, has not any estate; he has merely a naked possession. The consequence is, he has not any estate to transfer, to transmit, or to surrender, nor any interest capable of enlargement by a release.

General Observations.

As to all those tenants who have transferable or transmissible interests, one general observation may be made. Care must be taken, in deriving a title from them, to consider the effect of their conveyances; and to understand them as good in point of valid title, only according to the degree of interest which was vested in the grantor, or at least within the

power or scope of ownership of the grantor at the date of his conveyance ; not to be misled by the words of the deed ; and to conclude that a fee has been conveyed merely because the deed imports to convey a fee.

The next thing to be considered is, whether the deed or other conveyance was proper, and effectual to pass the interest which it imported to convey ; or whether the defect has been cured by adverse possession, nonclaim on a fine, and the like, or by release or confirmation of the persons capable of releasing or confirming ; or whether the defect has become immaterial from subsequent causes, as the determination of a particular estate, or by some other event, by which an estate once defeasible or determinable has become absolute or indefeasible under the statute of limitations, or the statutes of non-claim on fines.

And in regard to recovery deeds, and recoveries defective, for some cause connected with the title deeds, more than ordinary caution is requisite for the purpose of ascertaining that the defects have been cured. For instance, if one recovery has been defective, for want of a good tenant to a writ of entry, care must be taken that this defect has become immaterial by the failure of the estate tail, &c. or that the defect has been supplied by another recovery, or fine, or some other adequate assurance.

But if another recovery, which has been suffered, was essential to the validity and com-

pletion of the title, it is particularly incumbent on the conveyancer to scrutinize, with particular diligence, the title to the freehold ; and to take care that the freehold was vested, during the term in which the recovery was suffered, in the tenant by whom the second recovery was suffered.

For example, if *A* be tenant for life, with remainder to *B* in tail ; and *A* mortgages to *C* and his heirs ; and afterwards *A*, without the concurrence of *C*, convey to *D*, to the intent that a common recovery may be suffered in which *B* is vouched and vouches over, this recovery will be defective for want of a good tenant to the writ of entry ; since, during all the term in which the recovery was suffered, the freehold was in *C*, and not at any time in *D* ; but if *A* die, and another recovery is suffered, the defect in the former recovery becomes immaterial, so as the second recovery be duly suffered.

Especial care must be taken that in the second recovery the freehold was vested in the person named as tenant for that recovery.

In practice, it will be found that more titles are defective for want of a good tenant to the writ of entry than from any other cause.

In complicated cases it will, on consideration of the abstract, be proper to arrange the title under the freehold, by way of analysis, so as to consider the state of the title to the freehold distinctly.

Thus the whole attention will be confined to one object, and enable the mind to encounter and to subdue any difficulty.

Of the Power of Alienation depending on the Qualities of Estates.

HITHERTO the power of alienation arising from the *quantity* of estate has been considered. It will now be proper to add the leading observations which arise on the qualities of estates;

Considering them as estates,

In sole tenancy or severalty.

By entireties.

In jointtenancy.

In coparcenary.

In common.

In possession.

In reversion.

In remainder.

Vested.

Contingent.

Executory.

Absolute.

Conditional.

Defeasible.

Legal.

Equitable.

And it is observable, that the same persons may be jointtenants, or tenants by entireties, or tenants in common of one estate; and they, or

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any one or more of them, may have another estate of a different quality (*u*).

As to sole Tenants.

A sole tenant is to be considered as having the entirety, and consequently he may convey the entirety, or any portion of it; and thus if he conveys a portion, he ceases to be a sole tenant, and becomes tenant in common. For many purposes, each tenant in common has a sole or several seisin, or title; a distinct tenement; and hence the multiplication of entire services; but no tenant in common has a *sole tenancy* in the sense now intended to be expressed.

As to Tenants by Entireties.

A tenancy by entireties is peculiar to a gift to two persons, being, at the time when the gift takes effect, husband and wife (*x*).

This species of tenancy arises from the legal notion of the unity of their persons (*y*).

It may exist in application to an estate in fee, in tail, for life, or for years, or other chattel real.

Several consequences flow from the nature and peculiar qualities of this tenancy:

1st. If a grant be made to, or to the use of, three persons jointly, and two of them are

(*u*) 1 Inst. 183 b. (*x*) 1 Inst. 187; Wing. Max. 211.

(*y*) 1 Inst. 112 a. 187 b.

husband and wife; the three together are joint-tenants as between themselves; but the husband and wife are tenants by entireties as between themselves (z).

And for that reason the wife cannot under such gift be remitted for more than a moiety (a), as will be afterwards noticed.

For all the purposes of ownership, the husband and wife have only one moiety, and their companion in the tenancy has the other moiety.

Thus in the language of *Litt.* sect. 291; “Also, if a joint estate be made of land to husband and wife, and to a third person, in this case the husband and wife have in law, in their right, but the moiety, and the third person shall have as much as the husband and wife; viz. the other moiety, &c.; and the cause is, for the husband and wife are but one person in law, and are in like case, as if an estate be made to two joint-tenants, where the one hath by force of the jointure, the one moiety in law, and the other the other moiety, &c. In the same manner it is where an estate is made to the husband and wife, and to two other men; in this case the husband and wife have but the third part, and the other two men the other two parts, &c. *causa qua supra.*”

On the death of the husband and wife in the life-time of their companion, and without having

(z) 1 Inst. 187 b. 356.

(a) 1 Inst. 356.

severed the joint-tenancy, their companion will be entitled to the whole, or entirety, by survivorship.

So if the companion die in the life-time of the husband and wife, or either of them, and without having severed the joint-tenancy, the entirety will vest in the husband and wife if both be living, and in the survivor of them, if one of them be dead.

As between the husband and wife, the material difference arising from a tenancy by entireties is, that the husband has not, except as is afterwards noticed, any right as against his wife, to alien any part of the lands, or, at the common law, to forfeit them by attainer or otherwise (*b*) ; but on the death of the husband in the life-time of the wife, the entirety, or (as the case may happen,) their moiety, will belong to her, notwithstanding any alienation by the husband (*c*), or his attainer, &c.

But a gift to a man and woman, or a gift to the use of a man and woman, who afterwards intermarry, and although the use be executed in them after the marriage, will not make them tenants by entireties (*d*). And even a husband and wife may, by express words, at least so the law is understood, be made tenants in common by a gift to them during coverture.

But a deed of feoffment to a man and woman jointly, before marriage, and livery of seisin to

(*b*) *Wimbish v. Talboy's case*; *Plow. Com.* 58 b; 1 Inst. 187 b.

(*c*) 1 Inst. 326 a.

(*d*) 1 Inst. 187 b.

them after marriage, will give them the *seisin* as tenants by entireties (*e*).

The like law was applied to a grant to a man and woman jointly before marriage, and attornment to them after marriage (*f*).

In each of these instances no estate passed till livery in one case, and attornment in the other case.

So a recovery in value by husband and wife, on a voucher to warranty, shall render them tenants by entireties, although they recovered by force of a warranty, annexed to an estate of which they were joint-tenants (*g*).

On the same ground, a devise to a man and a woman jointly, who intermarry between the date of the will and the death of the testator, would confer a title on the husband and wife by entireties. *sed quære*:

But the authorities cannot with equal reason be applied to a bargain and sale to a man and woman before marriage, and enrolment after marriage.

The case of the use before the statute, and the execution after the statute, depends on the enactment of the statute of uses (*h*). That statute executes the possession according to such quality, manner, form, and condition, as they had in the use (*i*).

And when the husband and wife are seized as

(*e*) Wingate's Maxime 211; 1 Inst. 187 b. (*f*) Ibid.

(*g*) Nichol's case; Plow. Com. 483; 1 Inst. 187 b.

(*h*) 27 H. 8. c. 10. (*i*) 1 Inst. 187 b.

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joint-tenants, or tenants in common, the husband may alien his particular share, and such alienation will be good as against his wife, and all claiming under her (*k*).

It is also to be understood, that if husband and wife be tenants by entireties of a term of years, or other chattel real, then, with the exception of the instance in which the term is a provision for the wife under some agreement preparatory to the marriage, the husband alone may assign the term.

And let it be remembered, that husband and wife may, by a gift to them before they are husband and wife, be joint-tenants, either in fee, fee tail special, for life, or for years, or of any chattel real.

In all these instances they may be tenants in common.

Even when there are joint-tenants in special tail they may become tenants in common by a severance of the jointenancy.

Under a tenancy by entireties, the freehold is in the husband, so that he alone is, or can make, a good tenant to the writ of entry; but all charges, &c. by lease, or by conveyance made by him, will be void as against his wife, in the event of her being the survivor, in like manner as if the husband had been seised only in right of his wife.

Even when the husband and wife are tenants in tail by entireties, no fine to be levied, or

(*k*) 1 Inst. 187 b.

recovery to be suffered by the husband alone, will be prejudicial to his wife in the event of her being the survivor (*l*).

The cases which arise out of tenancies in tail by entireties are deserving of particular attention ; and the distinctions which exist between the operation of fines and recoveries, by one of several donees, being tenants by entireties, must be regarded with particular attention.

In the first place it will be proper to notice, that when a gift is made to a man, and his heirs begotten on a particular woman, he alone is the tenant in tail. So when a gift is made to a woman, and the heirs of her body by a particular man, the woman alone is the tenant in tail. The issue must claim as her heirs by this man, and not in any manner as the heirs of the man. The like observation is applicable to two persons who are married, or may lawfully intermarry, and the heirs of the body of one of them, begotten by or on the body of the other donee. No act therefore, either by fine, or recovery, proceeding in one case from the man, or in the other case from the woman, not being the donee in tail, can be a bar to the heirs in tail.

Also, when a gift is made to two persons who are not married, but who may lawfully intermarry, and the heirs of their bodies, or the heirs which one of them shall beget on the

(*l*) Beaumont's case, 9 Rep. 138; *Baker v. Willis*, Cro. Car. 476.

body of the other, so that they are joint-tenants in tail, both of them, jointly, before or after the marriage, may, by levying a fine with proclamations, or by suffering a common recovery, effectually bar the estate tail; and in the instance of the recovery, the remainders and reversions expectant on the estate tail.

A fine levied, or common recovery suffered by one of them, would be a valid alienation of his or her particular share, but it will not prejudice the other donee for his or her share; but if one of them levy a fine with proclamations of the entirety, this fine will, by force of the statutes of 27 Henry VII. and Henry VIII. be a bar to the heirs in tail, even of the other ancestor, and take from the estate of that ancestor in his or her share, its descendible quality under the estate tail. Thus the other ancestor will have a fee descendible to his or her heirs generally, and not to his or her heirs in tail (*m*).

This fee may descend to the issue as the general heir, but he cannot take the land or share in his character of heir in tail: Of consequence, he must take as liable to the debts of his ancestor, and to the charges, &c. which that ancestor may have created.

This instance is an anomaly in the law. It proves that the heir in tail may be *barred* by the act of a parent, who, as to this share, has not any power of alienation.

(*m*) *Baker v. Willis*, Cro. Car. 476.

Although the estate tail be deprived of its descendible qualities, all the other beneficial incidents, as the right to suffer a common recovery, will remain (*n*). The extracts given from *Beaumont's* case in a subsequent page, will more fully explain this point.

Beaumont's case; *Baker* and *Willis*, and *Errington* and *Errington* (*o*), deserve particular attention. They contain a large portion of useful knowledge applicable to cases of this description. They also afford a large score of knowledge illustrative of other topics connected with the duty of the conveyancer.

Even when the husband or the wife are tenants by entireties the husband may discontinue the entail (*p*).

And when the husband and wife are *joint-tenants*, or tenants in common in tail, as distinguished from tenants by entireties, a recovery suffered by one of them will bar the entail in his or *her moiety*, and convey that moiety (*q*).

But when husband and wife are tenants in tail by entireties, a common recovery suffered by one of them in the life-time of the other will not bar the other parent, or the heirs inheritable under the entail (*r*), nor the re-

(*n*) *Beaumont's* case, 9 Rep. 138, and *Baker v. Willis*, Cro. Car. 476.

(*o*) 2 Bulstr. 42.

(*p*) *Greenley's* case, 8 Rep.

(*q*) *Marquis of Winchester's* case, 3 Rep. 1.

(*r*) *Owen and Morgan*, 3 Rep. 5; *Shep. Touch.* 45; and *Practice of Conveyancing* 143.

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mainder-men ; and even although the husband should survive the wife, yet it should seem the recovery would be inoperative as against the heirs in tail as well as the wife, &c. (s).

And if husband and wife are tenants to them and the heirs of the body of the husband, and a recovery is suffered by the husband alone as tenant, this recovery, by reason of the tenancy of the freehold by entireties, will not bar the entail as to the entirety, or any part (t).

But according to *Sheppard* in his Touchstone, the entail would, in this instance, have been barred even for the entirety, if the recovery had been suffered by the husband as *vouchee*.

The language of *Sheppard*, p. 45, is, "If " lands be given to husband and wife, and the " heirs of the body of the husband, with re- " mainders over to strangers, and the husband " alone doth discontinue, the whole land, by " fine, feoffment, or bargain and sale indented " and enrolled, and the writ of entry is brought " against the discontinuuee, and he doth vouch " the husband alone, without the wife, and the " husband doth vouch the common vouchee, " and so a recovery is had ; this is a good " recovery for the whole land, and a bar to all " the estates in tail, and remainder and rever- " sion, but not to the estate of the wife for her " life after the husbands death."

Also, after the death of one of the parents,

(s) *Gwen and Morgan*, 3 Rep. 5 a.

(t) *Ibid.*

the survivor of them, except so far as that parent is restrained by the statute law, (as in the case of a woman tenant in tail, *ex provisione viri* (*u*), will be competent to bar the estate tail, and the remainders expectant on that estate.

The following points are connected with the law respecting tenancy by entireties, and will illustrate that useful learning :

If a husband, wife, and a third person, had purchased lands to them and their heirs; and the husband, before the stat. of 32 Hen. VIII. c. 1, had aliened the *whole* land to a stranger in fee, and died, the wife and the other joint-tenant were joint-tenants of the right; and if the wife had died, the other joint-tenant should have had the whole right by survivor; for that they might have joined in a writ of right, and the discontinuance should not have barred the entry of the survivor, for that he claimed not under the discontinuance, but by title paramount above the same, by the first feoffment, which is worthy of observation (*x*). But if the husband had made a feoffment in fee of *their moiety*, and he and his wife had died, their moiety should not have survived to the other.

The reason of the last proposition is sufficiently obvious; for as against the joint-tenant the feoffment of the husband was neither void

(*u*) 27 Hen. VII. c. 20.

(*x*) 1 Inst. 183.

or voidable, though, as against the wife, had she survived, the feoffment would have been voidable (*y*). Against the joint-tenant, the husband had a power of alienation over a moiety, and his feoffment severed the joint-tenancy.

To the extent of severing the joint-tenancy, the husband had the power of prejudicing his wife. But if the husband had conveyed the moiety of himself and wife, the joint-tenancy would have been severed, or suspended, while that conveyance remained in force (*z*). For a discontinuance made by the husband did take away the entry of the wife and her heirs by the common law, and not of any other which claimed by title paramount above the discontinuance (*a*) ; and therefore, if lands had been given to the husband and wife, and to a third person, and to their heirs; and the husband had made a feoffment in fee, (of the entirety must be understood) this had been a discontinuance of the one moiety, and a disseisin of the other moiety. And if the husband had died, and then his wife had died, the survivor should have entered into the whole ; for he claimed not under the discontinuance, but by title paramount from the first feoffor ; and seeing the right by law doth survive, the law doth give him a remedy to take advantage thereof by entry, for other remedy for that moiety he could not have (*b*).

(*y*) *Doe v. Parratt*, 5 Term Rep. 652.

(*z*) 1 Inst. 183. (*a*) 1 Inst. 327 b. (*b*) 1 Inst. 327 b.

In *Greenley's* case (*c*), a difference was taken and agreed between *a discontinuance* which implieth wrong, and *a lawful bar* which implieth a right; and therefore it was agreed, that if lands are given to husband and wife, and to the heirs of their two bodies begotten, and the husband levieth a fine with proclamations, and committeth high treason, and dieth, and the wife before or after entry dieth, the issue is barred (*d*); and the conusee or the king hath a right to the land; because the issue cannot claim as heir to both; and therewith, it was said, agreeth, 18 Eliz. 51 b.; adjudged; *vide* 5 Hen. VII. 32, *Colt's Assize*.

Also in *Greenley's* case (*e*), it was resolved, that the statute of 32 Hen. VIII. extended only to discontinuances, although the act hath general words, "Or be prejudicial or hurtful to the wife or her heirs," &c. But the conclusion is, shall lawfully enter, &c. according to their rights and titles therein, which they cannot do when they are barred, and have no right, title, or interest; and this statute giveth advantage to the wife, &c. so long as she hath right; but it doth not extend to take away a future bar, although the statute giveth entry without limitation of any time; but the entry ought to wait upon the right. And therefore, if the husband levieth a fine with proclamations to another, and dieth, now the wife may enter by force of the statute; for yet the fine is not

any bar to her, but her right doth remain, which she may re-continue by entry; but if she surcease her time, and five years pass after the death of the husband, she is barred of her right, and by consequence, she cannot enter, and the statute speaketh of fine only, and not of fine with proclamations; and therewith agreeth, 6 Edw. VI. Dyer 72 b.

And it was resolved, that if the husband be tenant in tail, the remainder to the wife in tail, that if the husband maketh a feoffment in fee, and dieth without issue, the wife may enter, because it was the inheritance of the wife. But if the husband suffereth a common recovery, and dieth without issue, there the wife is barred, and cannot enter by force of this statute; but this statute was made to relieve him who hath right, and to suppress wrong, and to advance right without respect to the warranty of the discontinuee, if he hath any. And if before the statute of *donis conditionalibus* lands had been given to husband and wife, and the heirs of their two bodies begotten, and they had issue, and the husband *post prolem suscitatum*, aliened the land, and died before the statute, and the wife survived, and died before the statute, the issue should have a formedon: for notwithstanding the same alienation a right did remain; forasmuch as the husband only aliened, which right is entailed by the statute; and before the statute the issue in such case might have a *sur cui in vita*, and claim as heir

of the body of both, for the feoffment was no bar, but a discontinuance; and therewith agreeth 21 Edw. III. c. 45; 12 Hen. IV. c. 7. And in all cases where the wife might have a *cui in vita* by the law, she shall enter by force of the statute of 32 Hen. VIII.; and where the issue cannot have a *sur cui in vita*, or *formedon*, there he shall not enter within the remedy of this statute. And therefore, if the husband hath issue, and alieneth, and the wife dieth, the issue shall not enter during the life of the husband, because at the common law he had no remedy to recover the land during the husband's life; and the words of the act are, " According to their rights and titles therein." But if the husband alieneth, and afterwards the wife is divorced *causa præcontractus*, or any divorce which dissolveth the marriage *a vinculo matrimonii*, there the wife, during the husband's life, may enter, for the words of the act are, " No fines, feoffments," &c. " during the coverture between them," and although, that afterwards the husband and wife are divorced, yet the feoffment was made during the coverture between them. And although that the statute saith, " But that the same wife," &c. the same is meant of her who was his wife at the time of the alienation; for when the husband dieth she is not then his wife, but she is called wife, to describe the person only who shall enter; and it is not said in the statute that the wife shall enter after the death of her husband, but

generally, that she shall enter according to their right and title; be it in the life of the husband, after a divorce *vinculo matrimonii*, or after his death.

In *Beaumont's case (f)*, it was resolved, that notwithstanding a fine with proclamations levied by the husband alone of lands, of which he and his wife were tenants by entireties, the wife, after the death of her husband, had an estate in special tail: and for the better understanding of the true reason thereof, it is to see by what law the estate of the wife shall be altered, and changed to an estate for life; and first, it was resolved, that it was not by the common law; for at the common law, if lands had been given to the husband and wife, and to the heirs of their two bodies, and after issue, the husband had aliened and died, this alienation had not barred either the wife or the issue in tail, because the husband alone had not power of aliening; forasmuch as he had an undivided estate jointly with his wife; and therewith agreeth 12 Hen. IV. *Formedon* 15; 21 Edw. III. 45; and by the statute of Westm. 2, *de donis, &c.* it is enacted, that a fine levied by tenant in tail *ipso jure sit nullus*. As to the case of 16 Eliz. of treason, whereof the husband is attainted, it is to know that such bar and forfeiture is by the statute of 26 Hen. VIII. c. 13, by which it is enacted, that every offender convicted of high treason, &c. shall

lose and forfeit to the king, his heirs and successors, all such lands, &c. whereof any such offender shall have any estate of inheritance; but in the same act there is a saving to every person (other than the offenders, their heirs and successors,) of all rights, titles, interests, &c.; so that it appeareth that the estate of the wife, if she overliveth the husband, is saved by this act; and that *the bar by the statute is only as to the issues in tail*, and not to the wife. And the reason of the resolution, that the heir is disabled in such case, is because he ought, in his lineal conveyance, to make him heir, as well to the father as to the mother, by the opinions of *Catlyn, Wray, Saunders, and Dyer*. And as to the case of fine with proclamations in 18 Eliz. levied by the husband alone (*g*), the bar is made by the statutes of 4 Hen. VII. c. 24; and 32 Hen. VIII. c. 36; and in the statute of 4 Hen. VII. there is a saving for the wife, if she bring her action or lawful entry within five years after she shall be uncovert, as she did in this case (*h*); and by the statute of 32 Hen. VIII. the fine levied with proclamations of lands entailed to him who levieth the fine, or any of his ancestors, shall be a sufficient bar against the said person and his heirs, claiming by force of any such entail, and against other persons claiming only to their use, or to the use of any manner of heir of their body, in which case there needeth not any saving for

(*g*) *Dyer*, 351 b.

(*h*) *Beaumont's case*, 9 Rep. 138.

strangers; for the purview of the act is special, and *secundum quid*, viz. against the heirs in tail, and others claiming to their use; and therefore *distinguendum est*, that the fine with proclamations levied by the husband, or the attainer of the husband of high treason, is a bar to the estate tail, *quoad* the issues in tail, but not *quoad* the wife; but that she, overliving, shall be seised of an estate tail, which estate is saved to her by all the said acts; and the same is proved by the said book of 18 Eliz. (k), for there the husband, being jointly seised with his wife in special tail, levied a fine with proclamations to the use of him and his heirs, (which fine is a bar to the issue in tail,) and afterwards the husband devised the land to the wife for life, and died, there the wife entered and waved the estate tail, claiming for life by force of the devise; which proveth, that if she had not waved the estate tail she should have had it, and not an estate for life, as is supposed by the other side.

It is also agreed, that if a gift be made to a husband and wife in tail, so that the marriage between them, *for a cause which impedes a future marriage*, is dissolved, they have an estate of freehold only, in the nature of an estate tail after possibility of issue extinct.

If they may again intermarry, why should they not be joint-tenants in tail? Is it because the gift was to them by entireties, and they

(k) Dyer, 351 b.

cannot on a subsequent marriage hold in that mode?

So if the husband discontinue the land of his wife, and after take back an estate to him and to his wife, and to a third person, for term of their lives, or in fee, this is no remitter to the wife, but as to the moiety; and for the other moiety she must after the death of her husband sue a writ of *cui in vita* (*l*).

So a wife tenant by entireties may be barred by non-claim on the fine of her husband, as appears in the extract from *Greenley's* case (*m*).

If an estate be made to a villain, and his wife being free, and to their heirs, albeit they have several capacities, *viz.* the villain to purchase for the benefit of the lord, and the wife for her own, yet if the lord of the villain enter, and the wife survive her husband, she shal enjoy the whole land, because there be no moieties between them (*n*).

This point is added, because it is assumed to be law, in application to a husband and wife, who are purchasers by entireties, when one of them is an *alien*.

Also, if a man make a lease to *A*, and to a baron and feme, *viz.* to *A* for life, to the husband in tail, and to the feme for years; in this case, it is said, that each of them hath a third part, in respect of the severalty of their estates (*o*).

(*l*) Litt. § 676.

(*m*) *Supra*, p. 50.
1 Inst. 187 b.

(*n*) *Supra*, p. 50.

1 Inst. 187 b.

The right of survivorship shall prevail against a husband when his wife and another person are *joint-tenants of a term*, and the wife dies in the life-time of the other joint-tenant, and before severance (*p*).

Though a husband and wife have a term of years as tenants by entireties, yet the husband may alien the entirety so as to bind the wife.

This point was decided in the case of *Grute v. Locroft* (*q*). In that case an under-lease by the husband alone prevailed against the surviving wife; and on principle, the wife could not have the rent though the reversion belonged to her.

That the wife was bound flowed from the right of the husband to alien the term, which he and his wife had in her right.

Finally, a tenant by entireties, while such, has not any devisable interest, even as against his own heir (*r*); and as between husband and wife, a tenancy by entireties cannot become a *tenancy in common*, though they, as to their share may become tenants in common with a third donee.

As to Joint-tenants.

THE distinguishing feature of a joint-tenancy is the right of survivorship; so that on the death of one or more of the joint-tenants, while the joint-tenancy continues, the estate will devolve to the survivors or survivor.

(*p*) 1 Inst. 185 b.

(*q*) Cro. Eliz. 287.

(*r*) 32 Hen. VIII. c. 1. 3 Rep. 36.

But the right of survivorship may be defeated by severing the joint-tenancy ; or the joint-tenancy may be *suspended* by a *partial* alienation while that alienation continues in force ; and if one of the joint-tenants die while the joint-tenancy is suspended, the right of survivorship will, as to the share so severed, for a time, be excluded.

Joint-tenants are not bound by the charges, (such as judgments, or mere annuities, or rent charges,) of each other ; but each is bound by the alienation of the other, of his own share or *aliquot* part, either for all the estate, or for a portion of it. Even an execution under an *elegit*, &c. would carve out an interest binding on the survivors (*r*).

Thus if joint-tenants be seised in fee, or for life, and one of them convey or assign his share, this alienation will sever the tenancy ; but should one of them demise *for years* (*s*), this demise, though it will bind the survivor, will not either sever or suspend the joint-tenancy.

If two joint-tenants in fee-simple be disseised by two persons, and one of the persons so disseised re-release all his right to one of the disseisors, he merely confers a title to that moiety over which he has a right of alienation (*t*).

Had he survived before he made the re-release, the right of the entirety would have passed from him.

(*r*) 1 Inst. 185.

(*s*) 1 Inst. 184 b.

(*t*) 1 Inst. 276.

In consequence of the interest remaining in the other joint-tenant, the re-leasee obtained a good title to one moiety; and of the other moiety the two disseisors remained joint-tenants, unless (and principle seems to oppose that conclusion,) the re-lease should operate on that particular moiety which was in the re-leasee.

And when two persons are joint-tenants, and one of them is adult, and the other a minor, and they make a conveyance in fee, this conveyance will be good for the moiety belonging to the adult, and void for the moiety of the infant; yet although the adult die, so that the infant becomes the survivor, yet he cannot avoid the feoffment of the adult joint-tenant (*u*).

But if two infants join in a feoffment, and one of them die, the survivor may avoid the feoffment as to both moieties, because there was a joint feoffment, and a joint title of entry (*x*).

But if each had made a distinct feoffment, the other, though the survivor, could succeed for his own moiety only.

And if two or more persons are joint-tenants in fee, in tail, or for any less estate of freehold, and one of them grant a particular estate of the freehold, retaining a reversion, this grant will suspend the joint-tenancy (*y*). Should the particular estate determine during the lives

(*u*). 1 Inst. 337 b.

(*x*). 1 Inst. 337.

(*y*) Litt. § 302, 303; 1 Inst. 193 a.

of the joint-tenants, the joint-tenancy will be revived. And the joint-tenancy will be severed as to such share, in case the suspension should continue until the death of the joint-tenant who was the owner of that share, or of the owner, if there be only one, or of the survivor, if there be several, of the other share.

But if two or more persons are joint-tenants *for years*, and one of them demise for years, this demise will sever the joint-tenancy (*z*).

It is also observable, that if three or more persons are joint-tenants, and one of them, or, if there are four or more joint-tenants, two of them, sever the joint-tenancy, the remaining shares will be held in joint-tenancy (*a*) ; and even if two persons are joint-tenants, and one of them alien a portion of his share as a moiety of a moiety, there will be a severance only for the share so aliened, and an equal or corresponding share of the other joint-tenants ; and the joint-tenancy will continue in force for the remaining shares. Thus if *A* and *B* are joint-tenants in fee of the entirety, and *A* alien a fourth part to *C* ; *B* and *C* will be tenants in common of one moiety, so that each of them will hold one fourth part in severality ; and the remaining moiety will be held by *A* and *B* as joint-tenants.

The same rule applies when three or more persons are joint-tenants, and two or more of them re-lease a part only of their shares.

(*z*) 1 Inst. 192 a.

(*a*) Litt. § 304.

So if one of three or more joint-tenants release to another of them, the share so re-leased will be held in severalty ; and as to the remaining shares the parties will continue joint-tenants.

The re-leasee is in by way of *conveyance* or title as an assignee, and not under the original feudal contract (*b*).

But if a re-lease be made by one of several joint-tenants to all his companions, they will continue joint-tenants as to the entirety, and be in under the original investiture. Such re-lease must be by deed, and the re-leasees will be bound by the charge of the releasor (*c*).

So if he re-lease to some only of the joint-tenants, that share will be severed ; but still the re-leasees will be joint-tenants, as between themselves, of the re-leased share ; and they will, in point of title, be assignees of the re-leasing joint-tenant.

The proper assurance between joint-tenants is a re-lease from one to the other. One may re-lease to all. Several may re-lease to the others. One or more may re-lease to some or one of the others ; and if they convey by lease and re-lease, or by feoffment, such lease and re-lease, or feoffment, will operate as a re-lease ; but then there must be a *deed* ; for mere livery of seisin, even aided by a mere writing, will not avail to pass the share of one joint-tenant

(*b*) Litt. § 304. 1 Inst. 380 a.

(*c*) 1 Inst. 185 a.

to another joint-tenant ; but one of several joint-tenants may lease his share to another of them (*d*).

And one joint-tenant may grant to a stranger for life, with remainder to his companion in fee (*e*).

Joint-tenants are said to be seised *per my et per tout*. They are in under the same feudal contract or investiture. Hence livery of seisin from one to another is not sufficient.

For all the purposes of alienation, each is seised of, and has, a power of alienation over that share only which is his aliquot part ; and joint-tenants, as to property held in joint-tenancy, necessarily have equal shares.

Blackstone (*f*) has very elegantly described the unities of *interest*, of *title*, of *time*, and of *possession*, which constitute a joint-tenancy at the common law.

If there be two joint-tenants, and one of them convey all, &c. or his part and share, &c., the conveyance will operate only on his own moiety ; and even though the other joint-tenant should die in the life-time of the conveying party, the conveyance will not pass more than a moiety ; and even though a bargain and sale be made of the entirety, by one of two joint-tenants ; and the other joint-tenant die after the execution, but before the enrolment of the bar-

(*d*) 1 Inst.

(*e*) 1 Inst. 192 b.

(*f*) 2d vol. 180.

gain and sale, no more than a moiety will pass (*g*).

In both these instances the joint-tenancy is severed by the conveyance, so that the share of the other joint-tenant will, on his death, devolve to his representatives ; or, in the instance of a lease to two for their lives, to the tenant in reversion or remainder.

In section 301, *Littleton* seems to have fallen into an error on this point.

But though if a lease for years be made so that the joint-tenancy is neither severed or suspended, the lease, notwithstanding it import to be of the entirety, will not pass more than a moiety, even if the lessor should eventually become seised of the entirety by re-lease, or by survivorship.

One case peculiar to joint-tenancy should be noticed in this place : When two or more persons are joint-tenants for their lives, either by express limitation, or by construction of law ; and though the grant be in express terms to them and the *survivor* (*h*), and one of them convey his share so as to sever the joint-tenancy, the interest will be abridged, and the share of each tenant, when held in *severalty*, will continue only during his life. *Expressio eorum que tacite insunt nihil operatur*, is the maxim, and renders the limitation to the survivor as part of the gift,

(*g*) 1 Inst. 186 a. Shep. Touch. ch. Bargain and Sale.

(*h*) 1 Inst. 191 a.

of no avail. Cross limitations by way of remainder guard against this result.

Also if two or more joint-tenants make a conveyance by their concurrence of all their estate, or a lease for years, the estates so conveyed or leased will, if the joint-tenancy continue, be determinable only with the death of the surviving joint-tenant; and even if one of several tenants for life lease for years, and die, this lease of his moiety will be binding on the survivor, and continue during his life, if the term of years should so long continue; but any rent reserved by such lease would, in this event, cease, and not belong to the surviving joint-tenant (*i*).

But if one of several joint-tenants for life should lease, and afterwards sever the joint-tenancy, and then die (*k*), no decision has been found which fixes the duration of the lease. The question to be raised on this case is, whether the lease shall determine with the death of the lessor, or shall continue during the life of the other joint-tenant. In its creation it had a capability of continuing during the whole period of the years, if the lives, or either of them, should so long live. But it may be objected, that, in point of law, the lessee has an estate for years, to endure so long only as the estate of the lessor shall continue, so that the lessee's interest will determine at whatever period the

(*i*) *Eustace's case*, Jones 55, 3 Salk. 204. (*k*) 1 Salk. 204.

estate of his lessor shall determine according to the boundary prescribed to it by law. This appears to be the better opinion.

But when several persons are joint-tenants *for their lives*, and one of them leases to a stranger for years, and then re-leases to the other joint-tenants, these joint-tenants will hold, subject to the lease, as long as their estate shall continue; and the term of years will not determine on the death of the lessor, for the lessees, while they hold, will hold under a title, which is subject to and charged with this lease (*l*).

Although a re-lease is the proper assurance between joint-tenants, yet to a stranger a joint-tenant, or one of several joint-tenants, must convey by feoffment, fine, common recovery, lease and re-lease, bargain and sale, or leave in like manner, and under the same circumstances, as he must have conveyed his share, if he had been solely seised, or had been a tenant in common.

It has been already observed, that a *mere charge will not bind the survivor*, taking in right of survivorship on the death of the person by whom the charge is created. But if the joint-tenant alien, then such charge will be good against his assignee; and if he become the survivor, such charge will bind him and his heir to the extent of the share which he had at the time of the charge; and judgments, statutes

(*l*) Wing. Max. 51; Lord Abergavenny's case, 6 Rep. 79.

staple, recognizances, crown debts, and the like encumbrances, may attach on the share as increased by survivorship.

And although the charge of a joint-tenant will not bind the survivor as such, yet if one of two joint-tenants accept a re-lease from the other, he will hold, in point of estate, under their grantor; yet the re-leasee shall be bound by judgments, and the like charges of the re-leasor; for to this purpose the title of the re-leasor has continuance (*m*).

But if the re-leasor die before execution on the judgment, and in the life-time of the other, yet the re-leasee shall hold the re-leased moiety discharged of any execution (*n*).

So if one of two joint-tenants in fee, grant a rent in fee, and afterwards re-lease to his companion, the re-leasee will of consequence be in under the estate of the original grantor, and no degree or conveyance be made as between the re-leasor and re-leasee; yet the title of the re-leasee is so far under the re-leasing joint-tenant, that the survivor shall not, even after the death of the re-leasing joint-tenant, hold discharged from the rent (*o*).

This class of cases is referred by Wingate (*p*), to the Maxim *qui prior est tempore, potior est jure*.

A joint-tenant has not any devisable estate; and even if a joint-tenant make his will while

(*m*) Lord Abergavenny's case, 6 Rep. 78 b.

(*n*) Ibid. 79 a. (*o*) Ibid. (*p*) p. 159.

he is joint-tenant, and afterwards become solely seised by survivorship or by release, his will, unless re-published after he becomes solely seised, will be operative (*q*).

Whether a contract by one of several joint-tenants may be specifically enforced in chancery against the surviving joint-tenant, is a point on which the books are not agreed.

In the more recent cases the *dicta* have been in favour of an equitable severance of the joint-tenancy by the contract. There are strong grounds for contending that the person claiming under the contract, has not any equity which he can make available against the surviving joint-tenant.

Though at the common law joint-tenants must be capable of taking at one and the same time; yet under the learning of uses and executory devises, persons may be joint-tenants who take at different times; thus, under a devise, or limitation to the use of the children of *A*, the estate may vest altogether in one; afterwards when a second child is born, then in two; and afterwards on the birth of a third child, in the three; and so on progressively as the children are born.

And when the gift operates by springing use, or executory devise, the rights of the unborn children to their shares cannot be defeated or prejudiced.

But when the gift to the children is by way

(*q*) 1 Inst. 185 b; *Swift dem. Neale v. Roberts*, 3 Burr. 1488.

of remainder, the case is so far governed by the rules of the common law, that no child can take a share unless he be born, or come *in esse* (*en ventre sa mere*) before the determination of the prior particular estates by which the remainders are supported (r).

And to merge, surrender, or destroy the particular estate, so as to deprive it of all support, as a remainder depending on a particular estate, is, it should seem, to defeat the right of after-born children.

Some qualifications must be added to this proposition.

For should the remainders be turned into a right of entry, and that right should not be asserted until the birth of other children, no well-founded objection seems to exist against the right of the after-born children, to enter jointly with the other children.

On this point no decision has been found.

These are a few only of the leading points belonging to the learning of joint-tenancy.

Coparceners.

COPARCENERS are several persons taking lands, or any undivided share of lands, held for an estate of inheritance by descent. They may have equal or unequal shares. For instance, two daughters, or two sisters, taking as co-heirs, will have equal shares.

(r) *Mogg v. Mogg*, 1 Merrivale; but see Jenk. 328, pl. 52.

But a daughter, and two grand-daughters, taking in right of a deceased daughter, will have unequal shares ; *i. e.* the daughter will have one moiety, and the two grand-daughters the other moiety between them. So heirs in different degrees, and on different descents, from heir to heir, are parceners, until there be a severance of title, by the change of the title by parcenary into a tenancy in common by alienation (*s*). But whether the co-heirs take equal or unequal shares, each has a power of alienation by deed or will over her own share.

But as between themselves co-heirs have a joint seisin ; and the rule of law is, that the several persons being *co-heirs* do, for many purposes, *make only one heir* (*t*). For this reason they may either *re-lease*, or by feoffment, or any assurance, convey to each other.

Notwithstanding they have a joint seisin for some purposes, yet on the death of each of them, the share of which she was actually seised will descend to her heir at law ; and (except in the case of estates tail) a more remote descendant may be preferred to the other co-heirs, on the ground that the more immediate descendants are of the half blood to the person last seised.

For example : *A*, seised in fee-simple, dies, leaving two daughters, *B* and *C*, who are of the half-blood to each other, since each daughter was by a different wife. They enter, and are

(*s*) Litt. sec. 313; 1 Inst. 196 a.

(*t*) 1 Inst. 163 b. 164 a. 196 b.

seised; *B* dies without issue; the uncle, or other collateral heir of *B*, will be entitled as her heir of the whole blood, in exclusion of the sister and her descendants, since *B* was the person last actually seised. But if *B* had died without having obtained an actual seisin, then *C* would have taken the entirety as the immediate heir to *A*, her father, the last person actually seised.

In general, and for most purposes, *the seisin of one coparcener is the seisin of the others*; and the possession of one coparcener is considered as the possession of the other co-heirs, except in cases of actual ouster, &c.

[Hob. 120, Dyer 128; *Reading v. Royston*, 2 Salk. 423; *Fairclaim v. Shakleton*, 5 Burr. 2604; *Fisher et al. v. Prosser*, Cowp. 217; *Peaceable v. Read* and others, 1 East 568.]

Coparceners are seised *per my et per tout*, yet each has a devisable interest; and a fine with proclamations levied by a stranger may, when both are out of possession, bar one without barring the others; since one may be, and the others, by reason of infancy, &c. may not be protected from bar by non-claim.

A re-lease from one to the other does not make any degree in the title. The re-leasee will, it is apprehended, be in by descent, and not by purchase, so that his ancestor will be deemed the first purchaser. On principle, a re-lease by *one*, to *one* of several other parceners, or to *some* of them, does make a degree in the title,

and the re-leasee, or several re-leases, will be the first purchaser or purchasers.

The law of coparceners involves the common-law learning of partition ; and this, lord *Coke* observes, is a *cunning learning* ; and there is a great peculiarity in the law applicable to coparceners, partitions, &c.

If one coparcener grant a rent to another for owelty of partition, this rent will be good, though granted without deed, and will be descendible as from the original ancestor (*u*).

A distress may be taken for it of common-right, without an express grant of a right to distrain (*x*). So a fee may exist in the rent without any words of grant to heirs.

So if two coparceners make partition by agreement, or by re-lease, the entinity of each, though in some degree a new acquisition, will be descendible in the same manner as the original share was descendible ; for instance, if *A* and *B* are coparceners, and they agree on partition, and re-lease to each other ; and the farm *A* is allotted to *A* for her share, and the farm *B* to *B* for her share ; then, supposing them to be seised by descent *ex parte materna*, the farm *A* will be descendible from *B* as seised *ex parte materna*, without distinguishing the part received by the deceased upon the partition from the part to which the deceased was entitled before partition.

(*u*) 1 Inst. 169. 177 b.

(*x*) 1 Inst. 169; 5 Rep. 7.

In short, mere partition, or a re-release upon partition, does not make any change in the seisin. This is evident from a variety of cases to be found in *Coke on Litt.* in the chapter Parceners, and Parceners by Custom.

Hence the rule, that mere partition will not produce the effect of revoking a will (*y*) ; and although the partition be made by a conveyance, or fine to the use of the respective heirs, they will be in *quasi by descent*, and not by purchase.

In this instance, the seisin is, in point of fact, and in point of law, changed ; but the use partakes of the quality of the old seisin. It is rather strange, however, that the same rule which applies to settlements under similar circumstances had not been applied to partitions ; for a conveyance by *A*, to the use of himself in fee, is a revocation of his will : and a conveyance on a partition to *the use* of the owner and his heirs, ought, in principle and consistency, to have received a like decision.

And it is agreed, that any modification of the uses by a power of appointment, &c. will produce the effect of revocation.

Luther v. Kidby is the leading case respecting partitions, as not producing the effect of a revocation.

That case is, beyond all doubt, law, as it applies to the original share ; but it is not easy to comprehend how the accessional or acquired

(y) *Luther v. Kidby*, 8 Vin. Abr. 148.

share could pass by a will made anterior to the partition. The only legal ground for supporting the title must be, that there is the same seisin, but this cannot apply as between tenants in common ; and yet the rule is, that a partition between tenants in common is no revocation.

In *Luther v. Kidby*, the devise was of a moiety ; and the doubt on the certificate of the judges is, whether the will operated upon the entirety. The original property of the party unquestionably remained subject to the dispositions of his will. The difficulty is to understand how the accessional or additional moiety could pass by the will, even upon general principles, and still more especially as the devise was of a moiety.

On this subject there are many pertinent observations by the present chancellor, in *Knollys v. Alcock*, 7 Ves. jun. pa. 558, from which it may be inferred to have been his opinion, that no more could pass by the will than was comprehended by the language of the will ; for instance, a devise of a moiety of the farm called *A*, could not pass all or any part of the farm called *B*, though that farm was received on a partition.

Many other difficulties of the like nature will occur in examining cases of this nature. The misfortune is, that the cases have carried the law beyond principle. They therefore baffle all learning founded on technical reasoning.

By anomalies, the best lawyer is most likely to be entrapped into error.

When decisions follow principle they form part of a system, and are remembered ; or rather the law is within the compass of the lawyer. Lord Coke's observations will readily occur, and should be in the recollection of judges, and protect the law from innovation by anomalies, and all departure from principle.

There is one instance of a right in parcenary changed into a *joint-tenancy*. It is, if two coparceners make a lease, reserving a rent, they shall have this rent in common as they shall have the reversion (*viz.* annexed to their estate in coparcenary). But if afterwards they grant the reversion, excepting the rent, they shall be from thenceforth joint-tenants of the rent (*a*). The maxim is *cessante causa cessat effectus*.

On the other hand, under a grant to two coparceners of a rent for owelty, they will have the rent as parceners and not as joint-tenants (*b*).

So if two coparceners alien *in fee*, rendering rent to them and their heirs, without any words of severance, they shall have the rent in course of coparcenary, and not as joint-tenants (*c*).

(*a*) *Wingate's Maxims* 19; *Finch.* 9.

(*b*) *Ibid.* 21, pl. 11; *Windham's case*, 5 *Rep.* 8 *a.*

(*c*) *Ibid.* 21, pl. 12; 1 *Inst.* 169 *b.*; but see 1 *Inst.* 12 *b*, and *Watk. Dig.* 290.

These and the like cases are founded on the maxim, that *things are construed according to that which was the cause thereof.*

Though on a partition between coparceners there be an implied warranty, while the privity continues, yet when one of them alienates in fee; or even in tail, while the title is held under the entail; the warranty ceases, and consequently the title to the lands given to the other partners on the partition need not be investigated.

Even the purchaser of the fee, or of an estate tail, will be discharged from the warranty, and consequently cannot be affected by it.

Tenants in Common.

THIS tenancy may be created by deed or by will, or arise by prescription (*d*), or it may arise in consequence of a severance of a joint-tenancy (*e*), or the change of a title by coparcenary into a tenancy in common (*f*).

Tenants in common have several freeholds, while joint-tenants and coparceners have one freehold (*g*).

This tenancy may be by express gift, or by construction of law; by construction of law, in the instance of a gift to two persons of a corody (*h*); or of a remainder to the right

(*d*) 1 Inst. 195 a. (*e*) Litt. § 294. (*f*) Litt. § 292.

(*g*) 1 Inst. 189 a; 5 Rep. 7. (*h*) 1 Inst. 190 a.

heirs of two persons who are living (*i*), not being husband and wife (*k*), and who must therefore take vested interests at different times, namely, the right heirs of each person on his death; also of a gift to two persons who may not lawfully intermarry, and the heirs of their bodies (*l*); or a gift to three persons as to whose marriage there is no impediment, and the heirs of their bodies (*m*), to a body corporate, and to a natural person (*n*); or to two corporations (*o*); by express gift, as in the instance of a gift to two during their joint lives, and from and after the death of one of them, to them, to be equally divided between them, share and share alike, as tenants in common, and their respective heirs and assigns.

So there may by proper words be a tenancy in common of the freehold, and a joint-tenancy of the inheritance.

These tenants may have equal or unequal shares.

They may be also tenants in common as to part, and joint-tenants as to the residue of lands.

Two persons may be joint-tenants of the freehold, and may have several inheritances in tail or in fee (*p*).

(*i*) *Windham's case*, 5 Rep. 7.

(*k*) *Roe v. Quarley*, 1 Term Rep. 630.

(*l*) Litt. § 296, 1 Inst. 189 b. (*m*) 1 Inst. 25 b. 184 a.

(*n*) 1 Inst. 189 b; 190 a. (*o*) Litt. § 296. (*p*) Litt. § 295.

Each tenant in common, not being a tenant in tail, has a devisable interest in his own share, or he may convey the same: he is to be considered as solely or severally seised of his share; he must convey the same by lease, or by lease and release, by feoffment, &c. even though he lease, &c. to his companion, [*Broke, feoffment de terre*] (*q*), exactly in the same manner, and under the same circumstances as he must have conveyed the entirety if he had been solely seised of the entirety. However, he cannot convey more than his particular share. One tenant in common, as such, cannot re-lease to another tenant in common as such.

But when two or more persons are joint-tenants as to certain shares, a re-lease from one of them to the other of them will be proper as to those shares, and it will not be any objection, that they are tenants in common of other shares.

If two tenants in common join in a lease, there is, in point of law, a lease by each of them (*r*); and in pleading, the title must be stated accordingly (*s*).

So if two tenants in common, in fee, grant a rent-charge, there is, in point of law, a several and distinct grant, by each, of a rent out of his moiety or part (*ss*); and no language expressive of an intention to grant one rent will be effectual to that end. They should

(*q*) pl. 45. (*r*) 1 Inst. 45. 200.

(*s*) *Heatherly and Worthington v. Weston*, 2 Wils. 232.

(*ss*) 1 Inst. 197 a, 267 b, 5 Rep. 7.

join in conveying the fee to uses, and create the rent by a declaration of use.

The possession of one tenant in common is *prima facie* the possession of the other tenants in common. It may, however, become adverse by actual ouster, or from a possession furnishing evidence of ouster (*t*).

In reference to titles derived through tenants by entireties, joint-tenants, coparceners, and tenants in common, care should be taken that the part-owners were, at the time of their respective executions of their conveyances, competent to convey the shares they professed to convey; and that the form of conveyance was adapted to the relative situation of the tenancy, and the persons to whom the conveyance was made.

Indeed the learning of tenancy by entireties, joint-tenancy, coparcenary, and in common, is of such general occurrence, and so is the learning of cross-remainders as connected with tenancy in common, that they ought to receive a large portion of attention. Lord Coke, in the second part of his first Institutes, has given all the leading principles and general rules.

Gifts with cross-remainders are uniformly grounded on a tenancy in common.

The tenancy under gifts of this sort is of a peculiar nature. Each owner has an estate in every part of the lands, or the moiety, &c.

(t) *Doe v. Prosser*, Cwp. 217.

which are settled. But each moiety or third part, &c. of each tenant is in a different degree as to the right of possession; so that, supposing estates in possession with remainders to occupy lines or degrees of ownership, and two persons to be tenants in tail, with cross-remainders between them, each would have a moiety in the first line or degree, and the other moiety in the second line or degree.

Again, suppose three to be tenants in tail, with cross-remainders between them in tail, each would have one third part in the first degree, another third part (being two distinct sixth parts,) in the second degree, and the remaining one-third part (being two other sixth parts,) in the third degree, and so on, in like manner, on a subdivision into a greater number of shares.

This subject is fully considered, and its application to practice shown, in the Tract on Cross-Remainders, &c.; and the substance of this Tract will be introduced into the *Essay on the Quantity of Estates*, on the re-publication of that Essay.

As to Tenants in Possession.

PERSONS who have the possession may grant it; and it is material to distinguish between estates in possession, and estates in reversion or remainder, on account of the mode of assurance which may be adopted, or may, under different circumstances, be deemed effectual.

Estates in reversion or remainder may pass by grant without livery; but estates in possession in corporeal hereditaments cannot, except in particular cases, pass by mere grant. There must be either livery of seisin, or some other ceremony which is equivalent, or a previous estate, to be enlarged by release; and in this sense a lease and re-lease are said to countervail a feoffment. So an estate in possession may pass by bargain and sale enrolled, covenant to stand seised to uses, or by fine, or fine and declaration of the uses of the same, or by common recovery and a declaration of the uses. In short, by any mode except by simple grant.

A term of years of lands in possession might, at the common law, have been created by *mere word* and entry; for till entry there was only an *interesse termini*, or being created, might have passed by mere word. An *interesse termini* to commence at a future day, or on an event, might have passed in like manner; even though the term was reversionary, and the possession was not in the lessee, but in a tenant; for if the possession had been in a disseisor, &c. there could not have been a valid lease without a previous entry to restore the seisin. Hence the practice of entering and sealing a lease on the land, or making escrows to be delivered on the land (*t t*).

But the reversion necessarily including the services could not be transferred, even for a term of years, without a grant by deed.

Terms of years of lands in possession may be transferred or surrendered without deed.

But it is apprehended that even a term of years, which confers a title to a reversion or remainder, cannot be transferred or surrendered without deed.

This point is more clear when there is, as between the termor and his reversioner, a reversion, than when the termor has a reversion merely in respect of having created an under-lease.

The point was in some degree discussed in *Harker v. Birkbeck* (*u*) ; *Beck v. Phillips* (*uu*), but it is very difficult to draw any satisfactory conclusion from those cases.

The general rule is, that all things lying in grant, from the nature of the thing or subject, as rents, commons, &c. or from the nature of the estate or interest therein, as reversions and remainders, cannot be granted or surrendered without deed.

Lord Coke observes (*x*), of freeholds and inheritances, some be corporeal, as houses, &c. lands, &c. these are to pass by livery of seisin, by deed, or without deed; some be incorporeal, as advowsons, rents, commons, estovers, &c. These cannot pass without deed, but [add, may pass] without any livery. And the law hath provided the deed in place or stead of the livery. And so it is if a man make a lease, and

(*u*) 3 Burr. 1556. (*uu*) 5 Burr. 2827. (*x*) 1 Inst. 49 2.

by deed grant the reversion in fee; here the freehold with attornment of the lessee by the deed doth pass, which is in lieu of the livery. See Bract. lib. 2, c. 18. *Et est traditio de re corporali de personâ in personam de manu, &c. gratuitâ translatio, et nihil aliud est traditio in uno sensu, nisi in possessionem inductio, de re corporali; et ideo dicitur, quod res incorporales non patiuntur traditionem, sicut ipsum jus quod rei, sive corpore inhæret, et quia non possunt res incorporales possideri sed quasi, ideo traditionem non patiuntur.* He adds,

This ancient manner of conveyance by feoffment and livery of seisin doth for many respects exceed all other conveyances. For (as hath been said) if the feoffor be out of possession, [read disseised] neither fine, recovery, indenture of bargain and sale enrolled, nor other conveyance, doth avoid an estate by wrong, and reduce clearly the estate of the feoffee, and make a perfect tenant of the freehold, but only livery of seisin upon the land; the other conveyances being made off from the ground, do sometimes more hurt than good, when the feoffor is out of possession [read disseised]; and yet in some cases a freehold shall pass by the common law, without livery of seisin; as if a house or land belong to an office, by the grant of the office by deed, the house or land passeth as belonging thereunto. So if a house or chamber belong to a corodie, by the grant of

a corodie, the house or chamber passeth. A freehold may by custom be surrendered without livery, as hereafter shall be said; and so of assignment of dower, *ad ostium ecclesiae*, or otherwise; and by exchange a freehold may pass without livery.

As to Tenants of Estates in Reversion.

THIS is the estate retained by a grantor of a particular estate, or by the settler, who, after limiting several particular estates by way of use, limits the ultimate fee to himself, or the same results to him by operation or law.

In a common-law gift, if he limit the fee in contingency, he will have the possibility of reversion. *Fearne* doubts this conclusion.

So if the testator create several particular estates, and the ultimate fee is limited to or to the use of his right heirs, this is a reversion, and descends to the heir. The authorities are collected in *Gwillim's Bacon*, ch. Remainder.

But a devise to trustees in trust for the heir or heirs at law of *B*, and the heirs, executors, &c. of such heir or heirs, though the heir at law answer the description, is not the old reversion, but a new gift, making the heir a purchaser (*f*). But if the use of the fee be limited in contingency, the fee will result to the grantor till it can vest; and if the fee be devised

(y) *Swain v. Burton*, 15 Ves. 365.

in contingency, that fee will descend to the heir at law, unless it be disposed of, as it may be by some residuary clause, or by some special disposition.

The ultimate interest taken under a conveyance to uses is not, strictly speaking, a reversion according to the rules of the common law. It is an interest in the nature, and partaking of all the qualities of a reversion. Whether this reversion remain in the lessor or settler, or the heir at law of a testator; or is aliened by the owner, either for the entire estate, or for a portion of it; or whether it be a residue of a particular estate; it retains its denomination of a reversion; so that there may be a reversion for years, for life, or in fee; and the estate, which is a reversion as to one person, may be a particular estate as to another person: for example: *A* leases to *B* for life, and grants the reversion to *C* for years; as between *B* and *C*, *C* has a reversion; but as between *A* and *C*, *C* has a particular estate.

And an estate in reversion may lose its denomination and peculiar qualities by becoming an estate in possession; and it may become an estate in possession by the surrender, merger, forfeiture, or actual determination of the prior estate.

The material circumstance to be regarded as to estates in reversion, is, that they cannot be granted or surrendered by mere writing. *Sheppard's Touch.* chap. Surrender.

But there may be a surrender of an estate in reversion by mere implication of law, as by accepting another estate incompatible with the estate surrendered.

It follows from the observations which have been made, that an estate in reversion may pass by mere grant. The contrary is supposed to have been asserted by Mr. *Fearne*, in his Reading on the Statute of Enrolments; but it is difficult to account for that great lawyer's having fallen into this mistake, if made by him.

Though a grant would be an effectual mode of assurance to pass an estate in reversion, a lease and release, and bargain and sale enrolled, are more generally used in practice; and they are entitled to preference from the circumstance, that they are in themselves complete evidence of title, while a mere grant, at least without a recital of the existence of the prior estate, must be supported by extraneous evidence, to show that a prior estate existed; so that there was a reversion divided from the possession.

As to Tenants of Estates in Remainder.

THE observations which have been made respecting the mode of alienation of estates in reversion are, *mutatis mutandis*, equally applicable to an estate in remainder, except that a remainder, instead of being part of the former

ownership, is a portion of estate granted at the same time with the prior or particular estate, and to take effect either absolutely, or eventually on the regular and proper determination of that estate.

A remainder is a residue of an estate in land, depending upon a particular estate, and created together with it (z).

It is also observable, that an estate, which is a remainder as to one person, may be a reversion as to another person; as, if *A* lease to *B* for life, and afterwards grant the reversion to *C* for life, remainder to *D* in fee; as between *C* and *D*, *D* has a remainder; but as between himself and *B* he has a remote reversion.

In one circumstance also there is a difference between a remainder and a reversion; a reversion always carries with it the actual or supposed fruits of seigniory; but a remainder, as such, gives no right to these fruits.

By reason of this difference, if an estate be granted to *A* in tail, remainder to *B* in fee, and *B* grant to *A* for an estate tail of the same extent as the former estate tail, the grant will not have any effect (a). While, if the reversion had continued in the grantor, and he or any person claiming under him had granted or devised to *A* in tail, this grant or devise,

(z) 1 Inst. 49 a.

(a) *Badger v. Lloyd*, Salk. 232; and *Lord Raym.* 523.

though giving an estate of the same duration, would have been good.

In the former instance the gift was nugatory, because it could not have any effect. The rule is *quod semel meum est amplius meum esse non potest* (*b*). In the latter instance, the gift is valid, since it will have the effect of passing the seigniory during the estate tail.

And if two estates of the same duration are granted, and the latter is granted out of the reversion, it seems to follow, that the grant will be good; but if a person having a remainder grant an estate which is commensurate only with the time of an estate previously granted, such grant would be nugatory. Thus if *A* grant to *B* for life, remainder to *C* in fee, and *C* grants to *D* for the life of *B*, it should, from the distinction taken in *Badger* and *Lloyd*, seem that the latter grant would be void. But *quære*: for it is the common practice in settlements and wills, by way of strict entail, to limit an estate to *A* during his life, with remainder to *B* for the life of *A*; and such remainder is allowed to be good on account of the possibility that the estate of *A* may determine in his life-time; and consequently the estate of *B* may take effect in possession during the life of *A* (*c*).

To these observations it may be added, that

(*b*) 1 Inst. 49.

(*c*) *Duncomb v. Duncomb*, 3 Lev. 437.

a remainder or reversion may pass by that name, as, all that remainder, or all that reversion of and in, &c. or a remainder may pass by the name of a reversion, or *è converso* (*d*).

And a remainder or reversion may pass by a grant of the land itself; and it is always more eligible, except in particular cases, as where there are several estates in the same person, and the estate in reversion or remainder is to be granted, reserving the particular estate, to grant the land rather than the reversion or remainder; and even if the reversion or remainder is to be granted, *eo nomine*, it is the more eligible mode to grant it by as simple a description as may be; as, all that the remainder or reversion for life; or, all that the remainder or reversion, in fee of the said . . . of and in all, &c. describing the parcels fully, or by reference, as the case may require.

It, however, more generally happens, that a remainder or reversion granted *eo nomine* is granted in terms of more minute description, showing its relative situation, and the manner in which it is expectant, &c.

In these and the like cases, care should be taken that the description be correct; for any material error in the description will be fatal; for then, in point of law, there will not be any such remainder or reversion; and as such remainder or reversion is the subject and

(*d*) 1 Inst. 299 b.

essence of the grant, the grant will fail for want of a subject on which it may operate.

Cases of this sort require particular attention; and it is incumbent on the conveyancer to satisfy himself that the description is true, in point of fact, and in law. When a person has several distinct estates, he may grant *one estate* by proper words, and retain the other estates (*e*).

Where the particular estate and remainder depend upon one title, the defeating of the particular estate is a defeating of the remainder (*f*).

But where the particular estate is defeasible, and the remainder by good title, there, though the particular estate be defeated, the remainder is good (*g*).

Hence a condition annexed to a particular estate is defeated by a limitation over (*h*).

And in wills, and in conveyances to uses, the remainder may take effect, though the estate for life should never vest.

A remainder of lands in possession may be created without deed, by reason of the livery (*i*).

But a remainder, when it is in that state, cannot, under the rules of the common law, be transferred without deed.

The particular estate and the remainder,

(*e*) 1 Inst. 319 a. (*f*) 1 Inst. 298 a. (*g*) Ibid.

(*h*) Dr. *Butt's case*, 9 Rep.

(*i*) Litt. § 60; 1 Inst. 49 a. 143 a.

for many purposes, make together the component parts of one estate.

The rules, as they apply to particular estates and remainders, are,

1st. There cannot, at the common law, be a remainder without a prior particular estate (*k*).

2dly. The particular estate may be for years, for life, or in tail.

3dly. If a remainder be limited in contingency, there must be a prior vested particular estate of freehold to support the remainder; for the freehold cannot be granted to commence *in futuro*; but notwithstanding the particular estate be suspended in the same instant in which it is created, still the remainder will be good (*l*).

4thly. The remainder must be so limited as to commence either absolutely or contingently, on the regular determination of the particular estate, without any interval even of a day, between the particular estate and the remainder (*m*).

5thly. A remainder expectant on an estate tail may be limited after an indefinite failure of the issue inheritable to the estate tail.

6thly. No estate in remainder can be limited after, and expectant on, a fee (*n*).

One fee, however, may be limited in the

(*k*) 1 Inst. 298 a. (*l*) 1 Inst. 298; Dyer 140 b. contra.

(*m*) Plow. 23. Raym. 144; Gwil, Bac. Abr. Remainder 738.

(*n*) *Nottingham v. Jennings*, 1 P. W. 23.

alternative, as a substitution for another fee, if that fee should fail of effect (*o*).

7thly. No estate limited by way of remainder can, as a remainder, be so limited as to derogate from, *abridge*, or *defeat*, any prior estate.

An interest so limited must, if good, operate either by way of executory devise, or springing use.

The particular estate must, in a deed, operating by the rules of the common law, give a vested interest, even though it be a term of years, otherwise the remainder will be void as a freehold *in futuro*, though the particular estate, as being for years, may be good.

But in a will or conveyance to uses, the particular estate may commence by way of executory devise or springing use; but the moment the particular estate of freehold vests, the limitation over by way of remainder becomes subject to the rules which attach to remainders.

Though the first estate be for years, and does not require livery of seisin to its perfection, yet livery of seisin must be made to the termor, that its benefit may be communicated to the remainder (*p*).

8thly. A remainder expectant on an estate of freehold may be limited to a person not in *esse*, or not ascertained, or to a corporation, while that corporation is incapable of taking, because it is without its head (*q*).

(*o*) *Doe v. Burnsall*, 6 Term. Rep. 30.

(*p*) Litt. § 60; 1 Inst. 49 a. (*q*) 1 Inst. 264 a.

This subject will be more fully discussed in considering the nature of contingent remainders.

Of Titles under Tenants of Vested Estates.

TENANTS who have vested estates are those persons who have actual estates, either in possession, reversion, or remainder; and these estates may be transferred from person to person, by the rules of the common law, and in all cases, except such alienation be restrained by the positive enactments of the statute law. Such interests are also devisable, either under the owners of contingent remainders or other contingent interests.

Strictly speaking there cannot be a contingent estate. There may be a contingent interest; but no interest, except such as is vested, is accurately termed an estate.

It is a general rule that the law favours the vesting of estates; for the law delights in vesting estates; and in the language of lord Coke (*r*), contingencies are odious in the law, and are the causes of troubles, whereas the vesting of them is the cause of repose and certainty.

And no remainder will be construed to be contingent, which may, consistently with the intention, be deemed vested.

But these rules have their limits, and their exceptions.

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A clear and express intention will prevail (*s*).

An estate will never vest contrary to the intention, when that intention is expressed, or is the result of the context of the deed or will; except there be a rule of law, as in the instance of the rule in *Shelley's case*, which, for reasons of tenure or policy, counteracts and defeats the intention (*t*).

Every contingent interest of freehold, limited by way of remainder, may be destroyed by the surrender, merger, forfeiture, determination, or destruction of each particular estate by which it is supported, or by the conversion of each particular estate into a right of action.

A contingent interest may also be re-leased by the owner; and contingent interests are devisable, and may be bound in equity by a sale for a valuable consideration, and may be bound at law by estoppel. They may also be extinguished by feoffment, fine, or common recovery.

A contingent interest does not enable the owner to transfer the estate by any conveyance to take effect in his life-time, under the rules of the common law. Contingent interests, however, of the equitable ownership, and even of the legal ownership, are assignable in equity.

In a court of equity, a contract is in effect an alienation, and will in that court be enforced.

(*s*) *Deakin v. Phillips*, 1 Maule and Selwyn 744.

(*t*) Succinct view of the rule in *Shelley's case*.

So if the remainder was contingent from any cause, that remainder may be transferred in equity, subject only to the contingency, exactly in the same manner as if it were a vested estate.

It appeared proper to notice these differences to prevent an indiscriminate practice of applying the same rules to equitable, which are proper to be applied to legal interests only.

In cases of this sort the decision in *Vick v. Edwards* (*u*) will occur to the lawyer, and will involve those not thoroughly versed in the principles of the law, in some embarrassment.

Whether the fee was vested or contingent is a question foreign to the present inquiry. But supposing it to have been contingent, (and it was contingent unless the trusts for sale can be considered as distinguishing this case from ordinary cases (*x*)) ; then a considerable portion of lord Talbot's observations in *Vick v. Edwards* is questionable.

In cases of this sort, except the nature of the trusts, or the context of the will, proves the estate to be vested, the better opinion is, that the inheritance is in contingency (*y*) ; and that while in contingency it cannot be conveyed. To complete the title, the concurrence of the grantor or his heirs, or the heirs of the testator, or in

(*u*) 3 P. Wms. 372.

(*x*) *Ex parte Harrison*, 3 Anstr. 836.

(*y*) *Ibid.*

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some cases his residuary devisee, is necessary ; and a fine, importing to pass the fee, so far from having the effect to transfer the contingent fee, will extinguish all title under the same.

Interests of this sort are called possibilities coupled with an interest, and are distinguished from mere rights or titles of entry. Contingent interests are devisable ; rights or titles are not devisable ; but they may be released or extinguished.

A gift to the survivor of several persons, or a gift to persons not ascertainable, as children who may attain twenty-one, is a mere possibility. This possibility cannot be released ; it may be bound at law by estoppel, in equity by contract. An expectant heir has a possibility. The contract of an expectant heir, though it will bind him, will not bind the succeeding heir (z).

An *interesse termini* is a future interest, and not an estate. Such interest, unless it be contingent, may be assigned or transferred. Whether a contingent interest in a term can be assigned, is a point for which no authority is found.

The decisions in the cases of *Matthew Manning* (a) and *Lampet* (b), merely establish that a possibility, coupled with an interest, is

(z) 1 Anstr. 11.

(a) 8 Rep. 187.

(b) 10 Rep. 46.

not assignable, though it be releasable. But each of these cases turns on the peculiarity, that all the estate was in the legatee for life, and no estate in the person who was to take under the limitation over.

That a contingent interest may be devised, is established by *Roe v. Jones (c)*.

But that a possibility may be devised, the interest must be such as is, in its nature, devisable. For instance, the owner must be entitled to an estate in fee, or *pur autre vie*, and not merely an estate tail in the lands; and it must be to a person ascertained, and not to the *survivor* of several persons, or to persons who are to answer a given description (*d*); and it should seem that no interest is devisable except it would be releasable; and that a gift to the survivor of several persons; or to such children of *A* as should be living at his death, or the like; does not confer an interest which may be devised, while it remains in its executory state, because the objects are unascertained; thus, a gift by one of two persons before he is the survivor, would not be good, although he afterwards became the survivor (*e*); or a gift by one of the children, in the life-time of *A*, would not be good, although such child should eventually be living at the death of *A*.

(c) 1 Hen. Blackstone, 38. (d) 2 Maule and Selwyn 165.

(e) *Doe v. Tomkinson*, 2 Maule and Selwyn 165.

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It is agreed, however, and even settled, that this interest may be bound, or even barred, by estoppel (*f*).

In cases of this description, fines, or recoveries, to operate by way of estoppel, should be adopted, instead of relying on mere re-leases by deed, except so far as the interest may be equitable, and consequently be bound by the re-lease, operating as a contract.

That contingent interests may be bound by estoppel is a conclusion to be drawn from *Weale v. Lower* (*f*). Such estoppel to pass an interest must be for years only; for if a feoffment should be made, or fine levied of the fee, by a person who has a contingent interest in fee, the interest itself would be extinguished (*g*). The learning of estoppel will be considered under a future division.

And a feoffment or fine by a person who has a contingent interest at law would extinguish such contingent interest, though the feoffment should be made, or fine levied, to a stranger (*h*).

When there is a contingent interest in tail, then to bind such interest as against the issue in tail, there must be a fine with proclamations to operate under the statutes of Hen. VII. and Hen. VIII. However, it is suggested, as a proposition consistent with the principles of law,

(*f*) *Weale v. Lower*; Pollex. 57; Moor 554.

(*g*) *Buckler's case*, 2 Rep. 55, and *Moore's case*, Palmer 365; *Goodright dem Burton v. Forrester*, 1 Taunton 578.

(*h*) *Moore* 554, 2 Rep. 55; Hob. 258; 1 Vol. of Practice of Conveyancing, 210; 2 Ib. 136.

that a donee of a contingent remainder in tail might preclude the issue, by estopping himself from taking a vested interest.

A common recovery, suffered by a person who has a contingent interest in tail, will not have any effect to bar the issue in tail, or those in remainder or reversion ; but it will bind the party himself by estoppel ; and perhaps may prevent the vesting of the contingent interest. And if a person who has a contingent interest in fee be vouched in a common recovery, this voucher will operate as a re-lease or extinguishment of his contingent interest (*i*).

But although contingent interests may be bound in equity by contract, yet, for the purpose of completing the legal title, there must be a conveyance of the estate when vested ; or there must be a re-lease to persons capable of such re-lease.

There is also a difference between contingent interests of the legal, and contingent interests of the equitable, ownership.

Contingent interests of the legal ownership cannot be transferred. On the contrary, a fine levied to a stranger, and purporting to pass the fee, will extinguish the contingent interest. But a contingent interest of an equitable ownership may be transferred. Thus, under a grant or devise to two, and the survivor of them, and his heirs, the fee will, generally speaking, be in contingency ; and it cannot be

(*i*) *Pells and Brown*, Cro. Jac. 590.

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transferred at law if it be of a legal ownership; and therefore it is highly imprudent in this case to levy a fine importing to pass the fee; and if a conveyance be made by lease and re-lease, its operation will be to pass the estate for life. At law it will not have any effect to pass the contingent interest. But in equity the lease and re-lease will give to the purchaser, if he be a purchaser for a valuable consideration, a right to call for a conveyance of the legal estate when vested; or a re-lease of it, as far as the intended vendor can make such re-lease with effect.

But if the equitable ownership be granted or devised to *A* and *B*, and the survivor of them, and his heirs; in this case also the fee is in contingency, but as it certainly must vest in one of these persons, a sale by them will give a complete title to the equitable fee; and for this reason, as against all other persons, they may be considered as having the complete power of alienation over the equitable inheritance.

It is also to be observed, that when the remainder is placed in contingency by will, the reversion in fee may pass by words in a residuary or specific clause (*k*); and for want of such disposition, the fee will descend to the heir at law (*l*); thus *A* and *B*, and the heir

(*k*) *Rogers v. Gibson*, 1 Ves. 492; *Stephens v. Stephens*, C. T. Talb. 228.

(*l*) *Plunket v. Holmes*, Raym. 28; *Purefoy v. Rogers*, 2 Saund. 380.

at law, may pass their estates for life and in fee; and the contingent fee to the survivor of *A* and *B* may be destroyed by the union and consolidation of the freehold with the fee.

Also in conveyances to uses, when the ultimate fee of the use is limited in contingency, the fee will result to the grantor or settler (*m*); and of course a conveyance by *A* and *B*, and the grantor, would cause a destruction of the contingent remainder to the survivor of *A* and *B*; and unless there be some other particular estate by which the contingent remainder might be supported, a feoffment, fine, or recovery, by *A* and *B*, would bar the contingent interest (*ma*).

A fine or recovery by one of them would preclude all possibility of him or of his heirs taking even eventually, though he should be the survivor; but, except so far as the remainder could be destroyed as a contingent remainder, for want of the support of a particular estate of freehold, the interest of the other person interested in the benefit of survivorship would not be affected by the fine or recovery (*mb*).

When a grant is by a conveyance at the common law to two, and the survivor and his

(*m*) *Fenwick v. Miford*, 1 Leo. 182.

(*ma*) *Earl Bedfورد's case*, Poph. 3.

(*mb*) *Weale v. Lower*, Pollexf. 57; *Buckler's case*, 2 Rep. 55; *Vick v. Edwards*, 3 P. W. 372.

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heirs, or the remainder in fee is by any other means placed in contingency, the language of the books of the most esteemed authority leads to the conclusion, that the fee passes out of the grantor, and does not immediately vest in the grantee. The inheritance is said to be *in abeyance*, or expectancy, or, figuratively, *in nubibus*, or *in gremio legis*; hence the distinction in the common law, and so often occurring in the books, that the inheritance may be, and that the freehold (more aptly the immediate freehold), cannot be, in *abeyance*. Hence, also, the rule, that there must be a vested estate of freehold to support a contingent remainder, whether the remainder be in a deed of feoffment, or of grant (*n*).

The doctrine of the abeyance of the inheritance, so far as it denies that the inheritance remains in the grantor, as an estate, is combated with great force by Mr. *Fearne*, in his *Essay on Contingent Remainders* (*o*). His argument is built on natural reason, and not on authority; for the cases of resulting use, or of the descent of the fee, when the fee is given by words of contingency, are admitted to be exceptions to the rules of the common law, and not founded on the rules of that law; and it is rather singular, that a gentleman who had contended so strenuously, and so successfully, in favour of

(*n*) *Essay on Estates*, chap. Freehold.

(*o*) 1st Vol. 285.

the technical rule under the doctrine in *Shelley's* case, should have become so strong an advocate, in the case under examination, for urging good sense and natural reason in opposition to the authorities founded on technical rules.

The strong point in Mr. *Fearne's* argument is, that when the contingent remainder in fee is destroyed, or fails of effect, the right of the reversioner will be in complete force; but this point, though readily conceded, does not establish his theory. It is quite consistent with the system of tenures, that when the contingent remainder has failed, the former owner should have, in full right, and as a vested estate, that which was intended for the person to whom the contingent remainder was limited. It is also consistent with the rules of tenure, that a tenant for life should not, with impunity, commit a forfeiture, and destroy the contingent remainders; and there is nothing in the nature of the grant, or in the intention of the parties, which precludes the former owner from entering, when all the estates limited by the grant are determined, by forfeiture, or by any other means.

In the admission that there is such a species of interest remaining in the grantor, as will become an estate on the determination of the prior estates before the contingent remainder can vest (*p*), so that the donor shall have the land again when it is ascertained that the right

heirs of *H* can never take the contingent fee limited to them; there is nothing at variance with the doctrine that the grantor has a mere possibility of reverter, as distinguished from an estate in reversion (*q*).

The rule is assumed to be, that while a contingent remainder in fee is capable of effect, the grantor has a mere *possibility of reverter*. The moment the remainder fails, either by destruction, or other accident, the grantor has an actual estate.

Supposing a grant to be made to *A* for life, remainder to *B* in tail, with remainder in fee in contingency; it is perfectly consistent that the grantor should have merely a possibility of reverter, while the contingent fee is capable of vesting, and that he should have an actual estate as soon as this contingent interest fails of effect. It is also a maxim of law, that no man shall take advantage of his own wrong. From this principle it flows, that when the tenant for life destroys the contingent remainders, the person who has the possibility of reverter shall be entitled to enter by reason of that possibility, which is now become an immediate and present right of entry; an estate; by the destruction of those interests which alone excluded the grantor from more than a mere possibility. It is difficult to find a single authority, or a single expression, in the books, which will support the

(*q*) Jenk. Cent. 248.

opinion advanced by Mr. *Fearne*. On the contrary, the system of tenures almost imperiously required, that when a man had made a feoffment the whole fee should pass out of him (*r*), although the ultimate inheritance was limited in contingency. Against the authority of the books, which contain the learning respecting the abeyance of the inheritance, it will be necessary for those who support Mr. *Fearne's* doctrine, to show that a conveyance made by the donor or his heirs, while a particular estate is continuing, and while the remainder is in contingency, would be a valid grant, whether the same was a grant of a rent-charge, or a grant of an estate of freehold. The case must be put nakedly of a grant to operate as a grant, by way of conveyance, and not by way of estoppel. The question must have arisen on a grant at the common law, as distinguished from a conveyance to uses, and from a disposition by will.

It may be said, the books treat only of the situation of the person to take the contingent remainder; and that the power of alienation is denied to a person so circumstanced; but it is impossible to read lord *Coke*, when treating of abeyance, or to read the observations in *Plowd*. Com. without feeling that the observations are applicable to the want of a power of alienation by the original donor, as well as by the person to whom the contingent remainder is limited.

(r) Litt. § 60; 1 Inst. 49 a.

Besides, the doctrine of the law, on the operation of feoffments ; the rules which require that every contingent remainder should be preceded by a vested estate of freehold, created by the same deed or instrument ; and that the contingent remainder must either vest or fail of effect before the determination of the estates of freehold by which the remainder is preceded, are all founded on principles which assume that the inheritance is in contingency, as well against the donor, as against the person to whom the contingent remainder is limited. The doctrine also which requires that when a grant is made to *A* for years, with remainder to *B* for life, with remainders over, the livery should be made to the termor for years, as the means of giving effect to the gift to the persons who are to have the remainder, is part of the same principle, and illustrates its application. It proves that the learning is founded on technical reason ; on the necessity that the seisin necessary to supply the grant should pass immediately and instantly from the grantor. The rule also which requires that the remainders should be so limited, that they may vest in successive owners, and that no chasm should be left between the determination of one estate, and the time appointed for the commencement of another remainder, is part of the same system. Thus a gift to *A* for his life, and after the death of *A*, and one day to *B*, is an example of a remainder which will be void, because it cannot vest immediately on the determination

of the particular estate. The nature, the object, and the principles of livery of seisin, admitting, however, of the exception of a grant for years, to be enlarged into a fee on a condition, also demand most imperiously, that while the estates limited by the grant are capable of effect, no part of the seisin should remain with the grantor. Hence the rule that a grant to commence from a future day is altogether void. Did the law depend entirely on natural reason and good sense, independent of the policy adapted to the state of tenures, a grant to *A* for life, to hold from Michaelmas-day next, would be deemed a good, and not a void, grant; and the mind would be satisfied of the justice of a decision by which it should be determined that the grantor should hold till the appointed day, or that he should retain the fee; and that on the appointed day the estate should vest in the grantees; but in conveyances at the common law effect is denied to grants of this or the like nature; while such limitations in conveyances to uses and in wills are allowed to operate. These are excepted cases, and turn, as to uses, on grounds of equity; as to wills, and on the indulgence allowed by the doctrine of executory devises, to testamentary dispositions. The more this point shall be examined, the more clearly it will appear to be an acknowledged rule of the common law, that after the grant of a contingent remainder in fee, the grantor retains no estate whatever, but has merely a *possibility*

of reverter, as distinguished from an *actual reversion*.

The case which Mr. *Fearne* (*rr*) cites from *Broke's* Reading on the Statute of Limitations, p. 84, namely, “*A* makes a lease for life, “on condition, that if the lessee has issue in his “life, the land shall remain to *W* in fee; and *A* “recovers against the lessee by writ of waste, “and has execution, the lessee has issue and dies, “no action of *fornedon* accrues to *W*, because “the fee remained in *W* until lessee had issue, “and then the recovery defeated the first “limitation,” may, if it be law, be accounted for on a consistent ground: *A* had a possibility of reverter till the waste; the waste was a forfeiture; the forfeiture was, in point of law, to *A*; and when he recovered, he was restored to his *seisin*, and defeated the estate of *A*; and, as a consequence, the remainder expectant on that estate, in the like manner as if the forfeiture had been by a tortious alienation, &c.

Indeed the case of a grant in fee, to a *corporation*, and the right of reverter to the grantor, on the dissolution of the corporation while seised, is an answer to the strongest point in Mr. *Fearne's* reasoning.

Contingent remainders are interests only, and not estates; they will present themselves for consideration under the arrangement which treats of contingent interests.

As to Titles Under Tenants of Cross-Remainders.

THE nature of these remainders has been stated in a former page of this volume (ss).

The first caution to be observed is, that cross-remainders are created.

When it is established as a fact, or as a conclusion of law, that cross-remainders are created, the title should be considered separately, as applying to the different farms, or the different parts of the same farm which are subject to the cross-remainders: For instance, if a farm called *A*, be devised to *A* in tail, and a farm called *B*, be devised to *B* in tail, and if either of them should die without issue of his body, then both the farms are devised to the other in tail or in fee, these are cross-remainders; and the title to the farm *A* should be considered distinctly, as if it stood limited to *A* in tail, remainder to *B* in tail; or, according to the fact, in fee; and the title to the other farm should be considered exactly in the same manner as if it stood limited to *B* in tail, remainder to *A* in tail, or in fee.

So if an entire farm be limited to several persons in tail, with cross-remainders between them in tail, the title should be considered with a view to each *aliquot part*; exactly in the same manner as if that part stood limited to *A* in tail, remainder to *B* in tail, remainder to

C in tail, &c. But when the cross-remainders are numerous, the division will branch into a great number of heads (*s*).

In short, this is the mode of analyzing titles which are complex in themselves. Such titles are by this mode of arrangement rendered simple.

In general the misfortune is the want of an accurate knowledge of the precise nature of these remainders, and of the ownership which exists under them. On this subject, the tracts on cross-remainders, and former observations in this volume, will afford the requisite information.

In deeds, except in reference to executory trusts, or marriage articles, cross-remainders cannot arise without express words of gift, creating the cross-remainders.

In wills, cross-remainders may arise by implication.

The rules applicable to wills, are,

1st. Cross-remainders will, from general words, be implied as between two persons;

Or, as between a class of persons, when the class may consist of one, two, or more persons, as the children of *A*; or the children of *A* who shall attain 21, &c. &c. (*t*).

2dly. Cross-remainders as between three or more devisees will not be implied, unless there be some expression which leads to the conclu-

(*s*) Tracts on Cross-Remainders.

(*t*) *Watson v. Faxon*, 2 East 36.

sion, that the remainder-man is not to take until all the devisees being tenants for life, shall be dead ; or all the devisees being tenants in tail, shall be dead without issue ; or that all the lands, &c. are to go over together, and not in parts.

The general rule of the common law is, that on a gift to two or more persons as tenants in common, for life, or in tail, the remainder or reversion will take effect in possession as to each share, when the particular estate in that share shall be determined.

The cases on this subject will be collected in the *Essay on the Quantity of Estates*, in the chap. on Estates Tail, and for Life ; or probably in a chapter to be appropriated to the subject of cross-remainders, and other cross-limitations,

In marriage articles, and executory trusts, for the benefit of children, or daughters, as a class of persons, entitled to estates-tail, cross-remainders will arise by implication from the nature of the interest, and on the same ground as they arise in a will, under a gift to a class in which the number of persons is not defined.

Of Titles under Contingent Remainders.

A CONTINGENT remainder must have all the general qualities of a remainder. It must be so limited that it may vest either during the particular estate, or *eo instante*, in which the particular estate, is to determine.

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If there must be an interval between the determination of the particular estate, and the commencement of the remainder, the remainder, as such, will be void.

Such a limitation over may, under circumstances, be good in a will as an executory devise, and in a conveyance, or gift, to uses, as a future springing use.

A remainder will be contingent for each or either of the following causes :

Because it is limited,

1st. To a person not *in esse*, as a child before its birth.

2dly. To a person not ascertained ; as to the survivor of several persons who are living :

Or to children who shall attain 21, or to persons who shall be living at the death of one, or of the survivor of their parents ; or to the survivor of several persons :

Or to the right heirs of a person who is living.

3dly. To a person, or body, which, though ascertainable at present, has not a present or immediate capacity ; as the right heirs of a person who is attainted, and is dead, and whose attainder has not been reversed :

Or to a corporation while it has not a head ; as to a mayor and commonalty, when there is not a mayor ; or to a dean and chapter, when there is a vacancy of the dean.

4thly. To a person or persons on a contingency, which is expressed, as to *A* for life ; and if *B* shall go to Rome, then to *B* in fee.

5thly. To a person on a *contingency which is implied*, with reference to the possibility that the particular estate may determine before the remainder can commence in estate ; as to *A* for his life, and from and after his death, and the decease of *B*, or from and after the decease of *B*, then to *C*, or to any other person for life :

Or to *A* for life, remainder to *B* for twenty years, if *B* shall so long live ; and from and after the decease of that person, then to *C*.

6thly. To a person on a contingency unconnected with the event, on which the particular estate is to determine ; as in the instance of a gift to *A* for life, and from and after the decease of *A* and *B*, or from and after the decease of *B*, then to *C*.

7thly. To a person on a contingent event, which is to determine the particular estate ; as to *A* and his assigns, until the return of *C* from Rome, namely, for a life estate ; and from and after his return, to *B* (*u*) ; or to *A* and the heirs male of his body, until *A* should do a particular act ; and after that act done, then to *B* in tail (*x*). A gift to *A* and his heirs until, &c. is a fee, and does not admit of a remainder (*xx*).

All contingent remainders may indeed be reduced to two heads, as being contingent, either, first, because they are limited on a contingency which is expressed ; or, secondly, because they are limited on a contingency which is implied.

(*u*) 3 Rep. 20 a.

(*x*) *Arton v. Hare*, Pop. 97.

(*xx*) *Essay on Estates*, chap. Fee.

The implied contingencies arise from the circumstance,

- 1st, That the person is not in *esse*:
- 2d, That the person is not ascertained:
- 3d, That the person has not any immediate capacity:

4th, That the particular estate may determine before the remainder can commence in interest.

The criterion and distinguishing feature of a vested remainder is, that it is capable of taking effect in possession immediately, if the particular estates were determined.

No contingent remainder can be limited to commence,

1. On an event, or at a time which of necessity must happen, after the particular estate is determined; as in the instance of a gift to *A* for his life, and from and after the decease of *A*, and one day or one month, to *B* for life, or in tail, or in fee.

2. On an act which is illegal; as the commission of felony, or the like:

3. On an event which is termed a *possibility on a possibility*, or double possibility:

4. On an event which the law will not presume to be possible; as to a child to be begotten, and to be born out of wedlock, namely a bastard not in *esse*:

5. On an event which is to defeat and avoid the particular estate.

The rules which apply to contingent remainders may be thus stated:

1. There must be a particular estate of freehold to precede and support the contingent remainders.

2. Such particular estate must be created by the same deed or will, or fine, as creates the remainder; or by a deed or will containing the power which limits the remainder (*f*).

3. Some one particular estate must continue as an estate, or as a right of entry, until the remainder can vest.

An estate converted into a right of *action* will not support a contingent remainder (*g*).

But though an estate be suspended it will support the remainder (*h*).

No remainder can, in point of expression, be *too remote*; since the necessity, that the remainder should vest during the particular estate, or *eo instantे*, that the particular estate determines; and the liability of a contingent remainder to be defeated by the merger, &c. of the particular estate, are a protection against the inconvenience of perpetuities.

Remainders may be in contingency even until the expiration of an estate tail, &c. (*i*).

But a remainder may be too remote and void, because it is limited to the children of a person unborn, *and to whom a prior estate for life is limited*. And all limitations over, by

(*f*) *Venables v. Morris*, 7 Term Rep. 342. 438.

(*g*) 1 *Feerne* 241. (*h*) *Salter v. Butler*, Yelv. 9.

(*i*) *Phillips v. Deakin*, 1 *Maule and Selwyn* 744.

way of remainder after, and expectant on, a remainder which is too remote, will also be void.

This is the doctrine of modern cases, though perhaps the decision most consistent with the common law would have been, that the remainders which were capable of effect should have been accelerated.

But a gift of a remainder to a person unborn, either for life, in tail, or in fee, will be good, unless it be preceded by a gift to the unborn parent of that person for life, or in tail.

A former observation is to be confined to leases for a life or lives, or an estate, not being a contingent remainder, for the life of some other person than the donee of that estate.

To offer comments on all these rules, and their application, and to show the exceptions to these rules, would require a profound treatise.

The elaborate Essay of Mr. Fearne on *Contingent Remainders*, and the head *Remainder*, in *Gwillim's* edition of Bacon's Abridgment, should be studied with the utmost diligence. Suffice it to say, that when the word "survivor," is used in the sense of other; or the words, "heirs," &c. are descriptive of a person in *esse* who is to take immediately; or, when the words, though contingent in expression, are not contingent in substance; as to *A* in tail, and if *A* shall die without issue, then to *B*; or to *A* for life, and if *A* shall die in the life-time of *B*,

then to *B* for his life, and not in tail or in fee; or, when the limitation to the heirs, or heirs of the body, falls within the rule in *Shelley's case*; or, when the limitation to the heirs is, in construction of law, the old reversion, so that the heirs are not to take as purchasers; or, when the words sounding contingently are adverbs of time, merely denoting that the remainder is to commence in possession, at a corresponding period marked for the continuance of a prior estate; as to *A* till *B* shall attain twenty-one; and when *B* shall attain twenty-one, then to him in fee; or, when an estate is limited from and after the death of a person who has a prior estate for life, or death without issue of a person who has a prior estate-tail; or the words which refer to a future event (being an event which must happen, as the death of *A*,) do, in effect, merely mark the period at which a prior estate is to determine; as in the instance of an estate to *A* for years, if *A* shall so long live; and after his decease, then to *B* in fee, and the term exceeds the probable period of the life of *A*; in all these and in like instances, the remainder will not be contingent.

A contingent remainder for years does not require the support of a prior particular estate of freehold; or that the particular estate of freehold should continue until the term can vest.

And contingent interests which are to com-

mence by way of springing or shifting use, or executory devise, are not governed by the same rules as contingent remainders.

It is sufficient that these interests can vest within the period prescribed by the rules against perpetuities.

Three rules however are to be remembered :

1st; No limitation will be allowed to operate by way of executory devise, or to have effect as a springing or shifting use, which, consistently with the language of the deed or will, and with the intention, can operate as a remainder.

2dly, Though a limitation operate in its inception, under the learning of springing uses or executory devises, yet the moment the first estate of freehold shall vest, all the subsequent gifts, limited after and expectant on that estate by way of remainder, will be subject to the rules by which remainders are governed.

3dly, Although gifts in a will are by way of particular estate, and contingent remainders, yet if the particular estate should fail by lapse, &c. in the life-time of the testator, the gifts intended to operate as remainders, may, by this change of event, become gifts to operate under the learning of executory devise.

These observations lead to other classes of cases which will be noticed when executory interests shall be the subject of observation.

Of the Persons Entitled under Executory Interests.

ALL contingent interests are executory ; but some interests are executory without being contingent.

Of this description are future uses, and interests by executory devise, which are to commence at a future but certain day ; or at a time which necessarily must happen ; as at the death of *A*, &c.

Executory interests do not admit of alienation by deed ; but the equitable ownership may be aliened for a valuable consideration. These interests are devisable, may be re-leased, and may be bound or extinguished by estoppel ; in the same manner and under the same circumstances as interests under contingent remainders.

While the interest remains executory, there is not any estate ; but an interest may change from being executory into vested. No surrender or re-lease of right can be made with effect to the owner of a contingent or executory interest ; nor can there be any merger in his ownership. From the time when the interest becomes vested it is to be considered like all other vested interests.

If an executory interest be aliened whilst it remains executory, the title may be good in equity although defective at law. The defect

in the legal title must be supplied by those means which the circumstances of the case may require; as by a conveyance from the owner of the executory interest after it is vested.

If a term for years be bequeathed to *A* for life, and after his death to *B* for the residue of the term, *B* has only an executory interest during the life of *A*, and this interest while executory may be assigned in equity; is transmissible to the executors or administrators; may pass by will, and assent, to a legatee, or be re-leased, but it cannot be transferred at law (*k*).

The whole legal estate is at first in *A*. A release to him by *B* will discharge his estate from this executory interest; and if *A* and *B* join in an assignment, this assignment will complete the title. It will amount to the assignment of *A*, and the re-release of *B* (*l*).

But if the bequest be to *A* for a certain number of years short of the original term, and *if he should so long live*, and after the determination of that estate, then to *B* for the residua of the term, *B* would have a legal estate, and so would *A*; one by way of particular estate, the other by way of remainder; and it is rather singular that this form of limitation was not originally introduced into practice.

When lands of inheritance are limited by

(*k*) Manning's case, 8 Rep. 95; Lampet's case, 10 Rep. 46.

(*l*) Ibid.

way of executory devise, the inheritance, in the mean time, till it can vest in the devisee, will descend to the heir at law, unless it be otherwise disposed of; as it may be by a particular or residuary devise. Of course the concurrence of the heir at law is in some cases necessary to complete the title, when it is accepted before the executory interest confers a title to a vested estate.

In general an executory devise cannot be barred by the person who has the estate subject to this devise; and therefore if a devise be made to *A* and his heirs for ever, and if he should die without issue living at his death, then to *B* and his heirs, no act done by *A*, by common recovery, or otherwise, will bar this executory interest (*m*).

But an estate tail may be subject to an executory devise; as to *A* and the heirs of his body, and if *A* should die under the age of twenty-two years, then, immediately after his death, his estate shall cease, and the lands belong to *B* in fee or in tail. This limitation to *B* is good only by means of the learning of executory devises; because it is limited in derogation and in abridgment of the prior particular estate, and is, in the prescribed event, to defeat that estate, without any regard to the circumstance, whether or not there shall be a failure

(*m*) *Pells v. Brown*, Cro. Jac. 590.

of issue of *A*, to cause the regular and proper determination of the estate-tail.

And a common recovery suffered by the tenant in tail, before the time shall arrive, and of course while his estate is continuing, will bar this executory interest, because the effect of a common recovery is to bar the estate-tail, and also all conditions and collateral limitations annexed to the estate-tail ; and, as a consequence, it will bar this executory devise as a collateral limitation.

The like observation, *mutatis mutandis*, is applicable to estates-tail, which are subject to collateral limitations by way of shifting use.

Also, if there be an estate tail with the reversion in fee, and this reversion in fee is disposed of by way of executory devise, the interest under the executory devise, will not be protected. It may be barred by the common recovery of the tenant in tail ; for as he may bar the reversion in fee, he may, as a consequence, bar all estates and interests derived out of the reversion.

If instead of the limitation to *B* to take effect on the event of *A*'s dying under the age of twenty-two years, the limitation had been to take effect on the death of *A* under that age, and without issue living at his death, this limitation to *B*, instead of being an executory devise, would have been a contingent remainder. This remainder might also have been barred by a common recovery

Entails, by way of executory devise, will not, while they remain executory, enable the owner of this interest to suffer an effectual recovery, so as to bar either his issue or those in remainder. It may operate by way of estoppel and extinguishment. But by a fine with proclamations, the owner of this interest may bar his issue, as well as bind them by estoppel.

The like observation is applicable to contingent interests, whether they are by way of contingent remainders or executory devise.

On the subject of executory interests, and in particular executory devises, *Fearne on Contingent Remainders and Executory Devises*, is the book proper to be consulted.

In reading with care this valuable book, rendered still more valuable by Mr. *Butler*, in pointing out the proper divisions of the work, a vast portion of professional knowledge, on a great variety of subjects, and of the utmost importance to correct practice, will be attained.

In the tracts on alienations by tenants in tail, cross-remainders, &c. there is also a note on the difference between vested, contingent and executory interests, which may throw some light on this subject.

And in the introductory chap. to the *Essay on Estates*, the difference between vested and contingent interests, and interests which are executed and executory, is briefly stated, and may help the student to take a short but

comprehensive view of this abstruse learning; generally considered difficult, but easy to be understood, if care be taken to lay a proper foundation for pursuing this branch of the law through all its niceties.

The caution to be observed in studying the more abstruse parts of the law, is, in the first place, to obtain a correct knowledge of the nature of these special and peculiar interests; to collect the more correct definitions; to ascertain the circumstances by which these interests are to be distinguished from other interests apparently the same, but substantially different; to discover the properties of the different interests; the nature of the ownership they confer; the means by which they may give a complete title, or eventually fail of effect, may be destroyed, or defeated, and by what means they may be aliened, barred, or bound at law, or in equity.

In his *Essay on Executory Devises*, Mr. *Fearne* has distinguished three sorts of interests of this description. To these six others may be added.

The three species of executory devise, &c. stated and exemplified by Mr. *Fearne*, are,

1st, Where the devisor departs with his whole fee-simple; but, upon some contingency, qualifies that disposition, and limits an estate on that contingency:

2dly. Where the devisor gives a future estate [read, interest] to arise either upon contingency, or at a time certain, but does not depart with

the fee at present, or limit any immediate freehold :

3dly, Where a term for years, or any personal estate, is devised to one for life, with remainder [read, a limitation] over.

Two of these varieties are proper to estates of freehold ; the other embraces chattel-real estates, and personal property.

It seems, however, that there are six sorts of executory devise applicable to freehold interests, and two, at least, if not three, sorts of executory bequest applicable to chattel-real interests, and personal property.

1st. *Pells v. Brown* fully proves the first sort of devises noticed by Mr. *Fearne* : In that case the testator parted with his whole fee-simple ; but upon some contingency the devise was to the testator's wife for life, remainder to *C* his second son, in fee, provided, if *D* his third son should pay 500*l.* within three months after his wife's death to *C*, his executors, &c. then the testator devised the lands to *D*, and his heirs.

This gift qualified the first disposition, and limited an interest on a contingency. No other remark is necessary on this case : *Marks v. Marks* (*n*) is open to the observation, that the devise to *D* was executory only so far as related to the estate of *C*. It did not extend to defeat the prior estate limited to the wife for her life ; and it was executory, because it

was to take effect eventually, and in derogation, and abridgment of an estate in fee. In reference to that estate it could not be a remainder, since it did not, and indeed could not, depend on the determination of the estate for life, because the estate for life was to determine before the gift to *D* was to confer a vested interest.

2dly. When the testator gives a future interest of freehold, to arise either on a contingency, or at a time certain, but does not depart with the fee at present, or limit any immediate freehold, this interest must be void, or operate as an executory devise. This is clear. A single substantive devise to the heir of *I. S.*, or to the first son of *I. S.*, when he shall have one, is a devise of this description.

The devise is future, because at the testator's death there is no person who can take immediately under this devise; and when lands are devised to *I. S.*, for five years from next Michaelmas, remainder to *B* in fee; and the testator dies before Michaelmas, then the devise to *B* is future; for although the remainder is limited to a person already in existence, and without any words of contingency, and is immediately expectant on the term; yet since the term is limited to commence from a future period, to happen after the testator's decease, and since the term is not *vested*, and since an *interest* only, and not an *estate*, is acquired in the land; the

remainder in fee cannot be vested while the term for years remains future and executory.

At the common law, such a limitation to *B* by deed would have been void (*o*). In its creation the limitation to *B* is a freehold, to commence in interest or estate at a future time. And since the term for years cannot vest immediately, the remainder to *B* must remain future and executory, till the term becomes a present and immediate interest.

These determinations all depend on principles of the common law relating to the freehold, and the necessity of avoiding an abeyance of the freehold. At this day they may be accounted rigid in the extreme. It may be urged too, that all the ends of justice would be perfectly answered, by giving the ownership and interest to the heir at law, for the limited period, during which the possession might otherwise be vacant; and measuring the extent and denomination of his interest by that time. In some cases this is done in the construction of wills, and of uses in conveyances to serve the uses; and more especially in uses to arise on the seisin of the author of the uses, *Roe v. Tranmer* (*p*); *Doe v. Whittingham* (*q*).

In the construction of deeds, and of surrenders of copyhold lands, being assurances which owe their whole force to the common law, this is

(*o*) Litt. § 350, *Buckler's case*, 2 Rep. 55.

(*p*) 2 Wils. Rep. 15.

(*q*) 4 Taunton 23.

never done. The few instances in which it is done, even in the construction of wills, are those only in which the heir at law may, consistently with the testator's general intention, take an estate for the exact period of his life, or for the exact time of an estate tail; or an estate arises to a wife for life, by reason of a gift to the heir after her death; and in those cases, the estates for life, or in tail, are taken by implication of law for the advancement of the testator's general intention, *Walter v. Drew* (*r*), and *Wealthy v. Bosville* (*s*), are instances of the heir's taking an estate tail under those circumstances. The case of *Pybes v. Miford* (*t*), may be adduced as an authority for an estate for life arising by implication.

All the cases, however, require that the testator, in making the arrangement and disposition of his property, should have left those vacancies of right of enjoyment which are exactly correspondent with estates for life or in tail, and allow of their being implied as existing in his intention.

When the time of which no disposition is made, is for days, or for years, [*Gardner v. Sheldon* (*u*),] or till there shall be a failure of the issue of any stranger, or any other person, in all these cases, the heir at law does not take any estate by implication; and, except in a few

(*r*) Com. Rep. 372.

(*s*) Rep. T. Hardw. 258.

(*t*) 1 Ventr. 372.

(*u*) Vaugh. 259.

cases, unless he can take, no other person can claim to be entitled. The exceptions will be collected and stated in the *Essay on Estates*.

It follows, that unless the heir at law, or the widow of a testator, can take an estate by implication, the heir at law will take the fee when the first estate of freehold is limited to commence from a future time, or from an event.

It follows too, that when the wife takes an estate of freehold by implication, then the devise sounding futurely, and giving occasion to that implication, operates immediately, and by way of remainder. In other cases also, devises which sound futurely may not refer to any contingency, as is exemplified in former observations; and in the cases collected in the *Essay on the Quantity of Estates*, chap. Freehold.

And in the case (*u*), in which the testator devised to his wife, till his son should come to the age of twenty-one years, and then that his son should have the land to him and his heirs, and if he should die without issue before the said age, then to his daughter, the devise to the daughter was a good executory devise;

1st, Because a fee was previously limited;

2dly, Because the devise was to determine and defeat that estate, in the event, that the

person to whom the fee was previously devised should die under the age of twenty-one years.

This case, and also the case of *Marks v. Marks* (*x a*), are composed of circumstances precisely similar, and are governed by the same principle. The case in question properly belongs to the first sort of executory devises; it has no relation to those of the second sort, since the fee was previously disposed of, and that disposition was qualified on a contingency; and the more remote devise was limited to take effect upon the contingency. In the last cited case, the ulterior limitation gave an estate by executory devise, because the previous limitation was to the brother in fee; and his estate was to be defeated only in the event that he should die without issue, under the age of twenty-one years, and not to be determined merely on the failure of the issue of his body, or the determination of an estate-tail. Suppose the words introducing the estate devised to the daughter to have stopped at the word issue, the words of limitation to the daughter would have qualified the estate of her brother into an estate-tail. But as the devise was to the brother and his heirs, and the estate devised to the daughter was not to take effect certainly either in possession, or in interest, on the event of the death of her brother, without heirs of his body (the regular and proper determination

(*x a*) Strange, 129.

of an estate-tail), but only in the event of his death before a limited time, the general import of the word heirs stood not only unimpeached, but explained in a special and qualified sense; and therefore gave a fee to the son. This is a point of difference continually occurring, and deserving of attention.

The third sort of executory devises of freehold interests may be described to be *where the testator gives a future interest of freehold, to take effect in possession after, and in subordination to, a particular estate of freehold; but the estate of freehold must necessarily determine before the more remote interest can come into its place*: thus leaving an *intermediate* space between the actual determination of one estate and the commencement of the other estate (x).

A devise to *A* for life, and after the decease of *A*, and *one year*, then to *B* in fee; or to several persons for particular estates, is an instance.

The devise to *B* is a disposition of a future interest of freehold, and is void by the rules of the common law, and to be supported only as an executory devise.

In a will, the superadded devise is good as a new and independent disposition, leaving the reversion in fee to descend to the heir at law, expectant on the decease of *A*, and liable to be drawn from him again after the given space from that event shall be completed.

The gift to *B* would, under the learning of executory devises, and admitting the estate for life had not been previously limited, have been incontrovertibly good; since the several devises are independent of each other, effect is not denied to the more remote interest on account of the estate of freehold previously devised: since there is not any connection between the estates, or any privity or relation between the several owners claiming under the will.

The preceding estate of freehold cannot support the future interest as a remainder, since the devise to *B* is a future interest of freehold; and the prior estate of freehold must necessarily determine before this more remote interest can come into its place, and must leave an interval between the determination of one estate and the commencement of the other estate. There would be a vacancy of ownership in the intermediate time, unless the fee descended to the heir at law immediately expectant on the estate of freehold limited by the will. It is clear, the fee will descend to the heir at law during this suspense of the fee under the will.

The fourth sort of executory devise of real estate is where a *particular estate*, as distinguished from the fee, either with or without a disposition of the fee, is given by will, and there is a devise in the same will, to take effect in derogation and abridgment of that estate,

before the period of its regular and proper continuance is accomplished; or where an estate-tail, or an estate for life, is limited to one person, and on an event, that estate is to cease and be defeated; and another estate is to arise, or a remainder is to be accelerated and take its place.

Page v. Hayward is no authority for a contrary conclusion.

In *Page* and *Hayward* (*y*), the testator devised to *A*, and the heirs of her body; provided, and upon condition, that she intermarried and had issue male by one surnamed *Searle*; and in default of both conditions the testator devised to *E* in the same manner; and it was adjudged by the court, that the estate devised to *A* was a good estate, in special tail, to her and the heirs male of her body, begotten by a *Searle*; and that the words upon condition, though words of express condition, should be taken to be words of limitation; and so the sense was, that upon her death without issue, by a *Searle*, the estate should remain over.

That this disposition was good as a remainder, depended on the construction of the whole will; for on the context, the estate-tail was commensurate only with the time at which the other estate was to come into its place.

The estate was to her and the heirs of her body begotten by a *Searle*, and to cease with the failure of these heirs, and not in the mean time; and therefore her estate could not determine in her life-time, since, till she was dead, there was not any certainty that there would be a failure of heirs of her body of this description.

And the devise over was to take place only in the event that there should be a failure of these heirs; and consequently not before the regular and proper determination of the estate tail. It was on this precise point that the case was decided; and the circumstance which led to the decision was, that upon the collective exposition of the will, the heirs of the entail were to be the issue by a man of the name of *Searle* only; and that the subsequent limitation was not to abridge that estate, but to commence in possession after the regular and proper determination thereof.

From the same case it is clear, that if the words of condition had been of a tendency to defeat the estate-tail in the life-time of *A*, they would not have given a proper remainder. They would have operated as a conditional limitation; and would indeed have been good only by executory devise. This drew from the court, the opinion, that if the estate had been to *A* and the heirs of her body, by a *Searle* begotten, provided, upon condition, that if she married any but a *Searle*, that then it should

remain and be to *I. S.* and his heirs, a common recovery before marriage would bar the estate-tail and remainders.

Now, from the mode of stating the case, the court clearly understood that this secondary limitation was to operate by executory devise, and not as a remainder.

For it was the opinion of the court, that the condition might in such a case, and unless barred, have determined the estate-tail in the life-time of the tenant of that estate, to the exclusion of the same; consequently it would not have given a strict and proper remainder.

That this was the sense in which the case was understood by the court, is clear, from stating the recovery to be suffered before the marriage. From that circumstance the inference is, that the conditional limitation might, in the supposed case, have taken place, unless barred by the common recovery; and that the common recovery to be a bar must be suffered while the person, taking under the prior limitation, was tenant in tail, and consequently before the contingency to defeat that estate should happen.

In *Gulliver v. Ashby* (2) the argument proceeded upon these very grounds; either that there were not any *express words* to make a conditional limitation, or that if the estate-tail was

subject to a limitation of this sort, the recovery was suffered before the estate-tail was determined, and the recovery did of itself bar the conditional limitation.

The opinion, then, of the court, in *Page v. Hayward*, or the opinion of the court in *Gulliver v. Shuckburgh Ashby*, does not militate against the conclusion, that an estate-tail may be defeasible by an executory devise. It rather follows from these cases, that all interests which are to take place in derogation and abridgment of a vested estate-tail, are executory devises.

The observation of Mr. Fearne (*a*), is, "Here we are to attend to the distinction between the first limitation being in fee, and its being only in tail; in the first case, we have seen the limitation over upon *A* dying without issue living, was good as an executory devise; for the whole fee being first limited to a person in *esse*, there was no considering the subsequent limitation as a remainder. But if the first limitation had been in tail only, then the subsequent devise might have been considered as a contingent remainder, depending on the estate-tail, and as limited to take effect only in case that estate-tail determined in the life of *A*; that is, in case the first devisee in tail died without issue in *A*'s life-time.

(a) 3d edition, p. 307.

But this observation is quite consistent with the observations submitted to the reader. This is obvious from the authorities he has adduced. The fact is, Mr. *Fearne* was keeping *Page v. Hayward*, and the decision in that case, strictly in view. In 310, Mr. *Fearne* admits this point.

So in *Spalding v. Spalding* (*b*), the devise was to *I*, a son of the testator *in tail*; and if *I* died, leaving *A*, then *A* to be *I*'s heir. The court construed the intention to be, that *A* was to succeed to his brother *I*, only in the event that *I* should die without issue, and that *A* should be living when the estate-tail of *I* should determine; so that *A* had a strict and proper remainder.

That this was the construction by which the will was interpreted, is clear from the Report; for it states the ground of the determination in these words; "the court conceived that the construction ought to be, if *I* die without issue, living *A*, consequently the estate-tail was to have filled its measure before the remainder was to commence in possession.

It is not an authority, that a limitation to take place with reference to an estate-tail, may not be good as an executory devise; nor does it prove that any limitation in a will, after an estate-tail, must necessarily operate as a *remainder*, and therefore wait for the regular determination of that estate, without any pos-

sibility of having effect in exclusion of the estate-tail. In that case, from the penning of the will, the limitation over gave a contingent remainder, and the remainder was contingent, from the circumstance, that it was not to commence in interest, certainly, on the regular and proper determination of the estate-tail, but only in the event that the estate-tail should determine within a given time, and, as the contingency was expressed, in the life-time of *A*. The true point of this case is, that by the intention of the parties, though inaccurately expressed, the limitation to *A* was not to defeat the estate-tail, and therefore the intention did not call for any reference to the learning of executory devises ; it was to take place on the proper determination of that estate, in the event that *A* should be living at that time, and therefore was a good and proper remainder, though contingent, from the circumstance that it was to commence in interest, only on a contingency which connected with the regular determination of the preceding estate.

Then, since words of condition, or rather conditional limitation, do in some cases, at least, tend to the abridgment and defeazance of estates-tail, it will follow that there is this fourth sort of executory devises of freehold interests.

On the cited case of *Gulliver and Shuckburgh Ashby*, it may also be observed, that the words of proviso were considered to be words

of *recommendation*, and not of *limitation*. The court considered the case, and heard the argument on it, as involving a question of intention, whether one estate was to be substituted in the place of the other on non-performance of the condition.

They did not see any objection to allow that a clause of defeazance may operate upon an estate-tail as a *conditional limitation*, to cease a prior estate in favour of a more remote one; and every conditional limitation in a will to abridge or defeat another estate of a freehold interest, is, if valid, an executory devise; for it is in this mode only that it can be effectual, since the common law has not any rule to support it; and conditional limitations of the like sort in conveyances to uses are allowed to have effect as shifting uses; and the cases applicable to uses are authorities to prove that similar limitations in wills may operate as executory devises.

But the point does not rest on mere conjecture, deduction, or argument; for the case of *Fry v. Porter* (c) is fully in point. In that case the gift to lady *Ann Fry*, the testator's heir, was for an *estate-tail*, upon condition, that if she married without consent, or died without heirs of her body, then to another person, and his heirs, so that there was a remainder in one event, and a conditional limitation in another

event; and the condition having arisen, the estate-tail was determined; and the determination must have been under the learning of executory devises; since a remainder, as such, cannot abridge or defeat the prior or particular estate. This is the like case as was put by way of supposition, in *Page v. Hayward*.

Besides the common and ordinary dispositions in wills; whether they are by way of direct gift, or through the medium of uses, by which the estate of tenant in tail is, on some act done, or omitted, to cease, as if he were dead without issue inheritable to the estate-tail, and some stranger is to have the possession in his stead, or some remainder is to be accelerated by way of substitution, in place of the estate so avoided or defeated, are examples of the same nature. They operate under the learning of executory devises or shifting uses; and in direct opposition to the common-law learning applicable to remainders.

A fifth species of executory devise of real estate is where an estate-tail, or an estate in fee, is on some event reduced to an estate for life (*d*).

This could not be accomplished at the common law. In effect, there are two distinct gifts; one is a substitution for the other. That the substitution can take place is the indulgence

(d) *Wright v. Wright*, 1 Ves. 409.

allowed to the will of testators under the learning of executory devises, springing uses, &c.

That there is a sixth species of executory devise of real property, may be concluded from general principles ; and it may be defined to be where there is a *devise of an estate of inheritance, or any other estate, and on some event a particular estate to a stranger, is introduced to take place in derogation of the estate of inheritance, and to a partial though not total exclusion of the same.*

The doctrine of uses admits of substitutions of this nature ; and this is a strong reason for concluding that they may be made under the doctrine of executory devises ; since executory devises incontrovertibly owe their origin to the learning of uses, and particularly to the doctrine of springing or shifting uses, and are deducible from that learning. Therefore, without referring to any authority determined on this particular point, it might, perhaps, be thought sufficient to rely on the learning of uses. But the case of *Hanbury v. Cockerell* (*e*), properly understood, goes the whole length of establishing this position, even in reference to executory devises.

In that case, a testator devised lands to his son *B*, in fee, and other lands to his son *C* in fee, subject to a proviso, that if either of his

sons should die before they should be married, or before they should attain the age of twenty-one years, and without issue of their bodies, then he gave all the lands which he had given to such of his sons that should so die, &c. unto such of his said two sons as should the other survive ; it was held, that the sons took in fee, subject to a limitation to the survivor for life, in case of either dying unmarried or under the age of twenty-one, without issue.

The question upon the case is, did this executory devise wholly defeat the original devise to the sons, or only introduce the limitation to the surviving son by way of exception, and for an estate for life only.

The case of (*ee*)

is no authority for the contrary of this position ; for according to the construction which the court gave to the devise in favour of the daughter of *P*, the daughter was to take an estate for life, to precede the estate devised to *F* and *P*, and they were to have a remainder expectant upon this particular estate ; and the estate to the daughter was not to determine, or in any degree defeat, the fee after it was vested. In simplicity of construction, it was an immediate devise to the daughter of *P* for life, remainder to *F* and *P*, as tenants in common in fee, and not, as imported by the words, an immediate devise to *F* and *P*, as tenants in common in fee, and to be defeated or

(*ee*) The reference to this case is mislaid.

abridged by an event to arise *after the death of the testator*. Suppose the devise to *F* and *P* had been so penned as to have given to *F* and *P* an immediate estate after the death of the testator; and that the devise to the daughter of *P* had limited to her an estate for her life, to supersede their estate after it had been vested, or in any other event than one necessarily connected with, and to be ascertained at, the testator's death; then the devise to her would have been executory, on the ground that it was not limited to precede the commencement in possession, or to wait for the regular determination of the interest given to *F* and *P*; but was, in a particular event, to exclude that estate from its place, by interposing another estate, and abridging, and partially defeating, that degree of interest to which *F* and *P* were originally entitled under the devise to them. In this respect, the case assimilates itself to *Carwardine v. Carwardine* (*f*).

That there are two sorts at least, if not three, of executory bequests of chattel-real and personal property, is perfectly clear. One sort (and it is the one noticed by Mr. *Fearne*) is where a term of years, or any personal estate, is devised to one for life, with a limitation over, improperly termed a remainder.

The second sort is where there is a complete disposition of the term or property; and there is a substitution of another person to take in

(*f*) *Fearne*, Butler's edition, p. 388.

some event which is to defeat or abridge the former devise. This secondary disposition does not operate by way of *remainder*, and in a deed would not be allowed to have effect. In wills it is permitted to be valid in favour of the testator's intention, and that his will may not be disappointed. Perhaps it may be said that this sort of bequest is the same in principle with the sort first mentioned. It differs materially in circumstances; and this difference is a sufficient inducement for pointing to the distinction, urging it as falling under another class, though clearly to be referred to the same origin.

Between these two classes of gift there is as much diversity as there is between the several sorts of executory devises of freehold interests, which Mr. *Fearne* has noticed.

They are all branches from the same root, and different only in their ramifications.

The *third sort* is, where there is a substantive and independent bequest, to wait for effect till the death of a life or lives in being, or till a contingency, in some manner connected with that event simply, or that event attended with a failure of issue at that time, or any given period. At least, unless this instance be an example of an executory bequest, it involves all the learning on the subject, as to the creation and qualification of such interests.

Numerous instances fully exemplifying the proposition, and descriptive of executory be-

quest, are to be found in books which treat on the subject of executory devise, and are referred to this learning. The only doubt which can be raised of their coming fully within the definition of an executory bequest is, that, perhaps, they are good at the common law. But the example of a bequest, of a term to *A*, after the death of *B*, to whom no interest is given, seems fully to establish this third species or variety, for such a gift would not be good, if found in a grant at the common law (*g*).

On all future interests arising from dispositions of personal and chattel-real property, it is observable, that they cannot, under any of the modes of gift which have been mentioned, give a remainder, in the proper sense of that term. They give interests, which are in the nature only of remainders. Even in those instances in which one limitation is to wait for effect, till the interest which passes by another limitation is determined; as to *A* for life, and after his decease to *B*; *B* has no remainder, properly so termed. The whole estate is in *A*, till his interest determines by his death (*h*).

Since the principal object of this chapter has been to define executory devises, and distribute them into their several classes, a few observations will be proper to mark the time during which devises, &c. receive this denomination. It applies to devises, &c.

(*g*) *Jermyn v. Orchard*; Show. Par. Cas. 199.

(*h*) *Lampet's case*, 10 Rep. 46.

1st, In the mode of their creation ; and,
2dly, During the period while the interests
are in an executory state. The instant they
become vested they receive that denomination ;
and (as far they are of freehold,) when *the first
estate of freehold becomes vested, all the estates
expectant thereon, and limited by way of re-
mainder, will be either vested or contingent
remainders.*

Limitations of chattel-real and personal pro-
perty are subject to different rules. No interest,
except that of the immediate possessor, can be
vested.

With this preliminary observation, it may be
safely asserted, that a *will operating by executory
devise may give interests, which at one time will
be executory; at another time contingent, as a
remainder; and ultimately vested;* and the term,
'executory devises,' is applicable only to the
mode of their creation, and the time while they
are under the protection of the rule relating to
interests of this sort.

In considering titles which involve the learn-
ing of executory devises, and shifting uses, it
will frequently be necessary to advert to the
law concerning perpetuities ; being the rule of
law which has guarded against the attempts,
made at different periods, to suspend the power
of alienation, or to provide a fund of accumu-
lation for an unreasonable period of time.

A short review of this rule may be taken
as it applies to,

- 1st, Particular estates.
- 2dly, Remainders.
- 3dly, Executory devises, springing and shifting uses ; and,
- 4thly, Trusts for accumulation.

1st, As to Particular Estates.

CHATTEL interests were of very little account in the early history of the law. When the principles of feudal tenure prevailed, the period when the general rules of property were established (*i*), the freehold was principally regarded ; and hence the rules which so anxiously provide against the *abeyance* of the freehold.

Even though a term of years may be granted to commence *in futuro* ; an estate of freehold, limited after, and expectant on, such future interest, will, under the rules of the common law, be void (*ii*).

Hence also the rule, that though a term of years may be created without livery, yet if a term of years be limited to *A*, with remainder to *B* for life, in tail, or in fee, livery of seisin must be made to the termor, in order that the benefit of the livery may be communicated to the estate of freehold (*k*).

Hence, also, if a grant be made to a man for years, to be enlarged, on condition, into a fee,

(*i*) *Essay on Estates*, chap. Freehold.

(*ii*) *Buckler's case*, 2 Rep. 55.

(*k*) Litt. § 60; 1 Inst. 217 a.

livery must be made at the time of the grant, and will pass the fee immediately (*l*), subject to be defeated, unless the condition be performed; and afterwards the grantee will hold for the term of years if it be not expired (*m*).

2d, As to Remainders.

The common and ordinary form of limitation is to *A* for life, remainder to the first and other sons of *A* in tail, remainder to *B* for life, remainder to his first and other sons in tail.

As far as these sons are in existence the remainders are vested; and as far as they are unborn, the remainders are contingent.

As contingent remainders, when they are of the legal estate, and of freehold lands, they may, by the rules of law, be destroyed by surrender, merger, forfeiture, or destruction of the particular estates before the remainders can vest.

But limitations of contingent remainders by way of trust, cannot be barred, by any act of the particular tenant.

Contingent remainders of the legal estate, either of freehold or copyholds lands (*n*), may fail of effect by the determination of the prior particular estates of freehold quality, before the remainders can vest in interest. This axiom was grounded on the rule of law, which cautiously avoids the *abeyance* of the freehold (*o*).

(*l*) Litt. § 349, 350; 1 Inst. 216 a. (*m*) Ibid.

(*n*) 2 Ves. jun. 209; 1 Watk. Copyhold, 192.

(*o*) Gilb. Ten. 165; *Essay on Estates*, ch. Freehold.

But contingent remainders limited of the trust, may take effect, notwithstanding all the particular estates should fail before the remainder can vest in interest.

The common law does not seem to have adopted any other rules against remainders, as tending to a perpetuity, than that (first,) all estates for life should be measured by the lives of persons in *esse*: and (secondly,) that every remainder should come in *esse* as a vested estate, during the particular estate, or *eo instantे*, in which the particular estate should determine.

All remainders may vest in interest, unless they be obnoxious to the objection of contravening the policy of law against perpetuities.

A gift to *A* for life, remainder to the first son of *B* who shall attain the age of twenty-five years, is a good remainder under the rules of the common law. That the remainder is good, and free from the objection of being a perpetuity, arises from the circumstance, that the law annexes to this remainder, the qualification that it must either give a vested interest, or fail of effect, during the particular estate, or in the very instant in which that estate shall determine.

If a like limitation of the trust be good, it must be on the ground, that the courts of equity must annex to the gift of the remainder a qualification, by construction, that the son shall attain twenty-five in the life-time of *A*.

Unless it be valid in this mode, the gift is too remote, and void.

A gift in any other mode than by way of remainder, to a class of persons, as, children of a person in *esse*, attaining twenty-five, &c. will be void, although some children are in *esse*, and will be twenty-five within the period of twenty-one years (*p*).

But a gift to children of a deceased person, who shall attain twenty-five; or to each of certain persons, as children in *esse*, and named, who shall attain twenty-five, &c. is not open to the objection of being too remote.

There is also a difference between contingent remainders of lands of freehold, and lands of copyhold tenure.

Contingent remainders of copyhold tenure may fail of effect, by the regular determination of the particular estate before these remainders can vest in interest (*q*); but they cannot be destroyed by surrender, forfeiture, or the like act, proceeding from the owner of the particular estate; and contingent interests of the trust of copyhold lands, may also, under the learning of springing or shifting uses, rather than of remainders, take effect, notwithstanding the determination of the particular estate before these remainders can vest in interest.

The rule of law respecting remainders has

(*p*) *Audley v. Gee*; 1 Cox. Rep. 324; *Robinson v. _____ at the Rolls 1817.*

(*q*) 2 Ves. Jun. 209.

also guarded against the suspense or abeyance of the freehold, by rendering it necessary that every remainder shall be so limited, as to vest in interest during the particular estate, or *eo instante* in which that estate shall determine.

For this reason a limitation to *A* for life, and after the decease of *A*, and one day, to *B* in fee, is, in point of law, and as a remainder, void in its limitation, because there is an *interval* between the remainder and the particular estate. But such a limitation by way of executory devise, springing use, or trust, would be good, as has already been shown.

Another rule of the common law respecting remainders, is, that *every remainder must wait for effect till the regular and proper determination of the prior estates.*

One estate is not allowed to be limited in derogation, or abridgment, or defeazance, of another estate; but each estate must take effect successively in order and course, as it is limited. And even by the rules of the common law, a *condition* annexed to a particular estate will be annulled by the limitation of a remainder, after the estate to which the condition is annexed; since no one, except the grantor or his heirs, as to real estate, or executors or administrators, as to chattel interests, can, by the rules of the common law, take advantage of a condition (*r*).

(*r*) Litt. § 358; 1 Inst. 118 b; *Doe v. Lawrence*, 4 Taunt. 23; Shep. Touch. 117.

A gift by will of property held for estates of inheritance, or for lives, may operate by way of executory devise,

1st, Because the first estate of a freehold quality, is given

1. To commence from a certain time, which shall not have arrived at the devisor's death.

2. To commence on an event which does not happen in the testator's life-time.

3. To a person, who at the death of the testator is not ascertained; as to a person not then in *esse*; or to the survivor of several persons.

2dly, Because an estate of a freehold quality, though limited after a particular estate of a freehold quality, is to take effect from and after an *interval between* the determination of a particular estate, and the time appointed for the commencement in interest, of the gift in question.

All these gifts correspond to *springing uses*, and are of the same nature or quality.

As they assimilate to springing uses, they may, with propriety, be denominated *springing interests by devise*.

3dly, Because the gift, though it is to a person not ascertained, or not capable immediately, is, after a particular estate of freehold quality which fails in the life of the devisor.

4thly, Because the gift is in derogation, or abridgment, and in defeazance, in the whole or

in part, of an estate previously limited for life, in tail, or in fee.

This species of devise is, in some instances, of the nature of a shifting use; in other instances, of the nature of a springing use.

A gift by will of personal estate, or of terms of years, or other chattel interest, may operate by way of executory bequest:

1. Because it is to a person after, and expectant on, a previous gift for life:

2. Because it is to a person in *esse*, or not in *esse*; ascertained, or not ascertained; on some event or contingency by which the preceding gift is to be defeated, wholly or in part:

3. Because a gift previously made is to be partially defeated by a subsequent gift of a particular interest.

And lastly, *every direct gift by will, which is good, and yet contrary to the rules of the common law, operates by executory devise or bequest.*

And as a consequence of the rule against perpetuities, every gift by executory devise must be so limited as to vest, or fail of effect, within a life or lives in being, and twenty-one years, and the periods of gestation. There follows this result;

Every gift by will, which cannot, on the one hand, have effect, except under the learning of executory devises; and on the other hand, is so limited that it must wait for effect, as a vested interest, until the indefinite failure of

issue of any person, is too remote, and for that reason void; though it be limited after, and expectant on, a prior gift to another, and the heirs general or special of his body.

The subject of executory devises, &c. is of such general importance that it merits a more detailed consideration; and a few observations will be added in further elucidation of the subject.

The general rule, as already stated, is, that no gift or limitation in a will, or of an use, will operate under the learning of executory devises, springing or shifting uses, if it can have effect by the rules of the common law.

Hence the observation of Mr. *Fearne* (*s*): ‘Wherever a future interest is so limited by devise as to fall within the rules above laid down for the limitation of contingent remainders, such an interest is not an executory devise, but a contingent remainder. The observation of Lord *Keeper Henley* in *Carwardine v. Carwardine* (*t*), is, that it was a certain rule of law, that if such a construction could be put upon a limitation, as it might take effect by way of remainder, it should never take place as a springing use, or executory devise.’ And Lord *Kenyon* observed, in *Doe v. Morgan* (*u*), “That if ever there existed a rule respecting executory devises, which had uniformly prevailed, without any exception to the contrary, it was that which was laid down

(*s*) *Fearne* 299, 3d edition.

(*t*) *Butler's Fearne* 392.

(*u*) 3 Term Rep. 763.

by Lord *Hale*, in the case of *Purefoy v. Rogers*, that where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise.

A consequence from this rule is, no gift by will or by use, will operate by executory devise, if at the time when the instrument becomes complete, it can, consistently with the intention, and the language in which that intention is expressed, operate as an estate in possession, or as a remainder, vested or contingent.

But a limitation may in one alternative be a gift of a proper remainder; in another event an executory devise or shifting use; as to *A* for life, and after his death, to his first son in fee, being a son unborn; and if there should not be any son, or if such son should die under twenty-one, then to *B* in fee.

In construction of law there are two distinct gifts.

This gift will be an alternate remainder, and in contingency, so far as it is a substitution for the gift to the son; and an executory devise, or shifting use, so far as it is to defeat the estate of the son, in the event of his death under twenty-one.

So an interest, limited by way of contingent remainder, and which would be void, as such, may, by a change of events in the life of the testator, become a gift by executory devise.

And a gift which in its frame, was an executory devise, may, by the change of circumstances in the life-time of the testator, become,

1st, A vested estate in possession;

2dly, A vested remainder; or,

3dly, A contingent remainder liable to destruction.

“Wherever one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken (*x*).” Therefore a more remote interest cannot be vested when a more immediate interest is executory.

And if the more immediate interest be too remote, every limitation over must, with certain qualifications afterwards noticed, be too remote.

But a residuary devise, or a special gift, substituting a devisee in the place of the heir, may give the fee as a vested interest, while the other gifts confer an executory interest (*x*).

And the same gift may have a double aspect, and be good in one contingency, express or implied, although it may be too remote, and void, in another contingency (*y*).

But in gifts of *proper remainders*, every subsequent gift, after one which is too remote, will also be too remote; and for that reason void.

It is the distinguishing quality of an interest under a good executory devise, that, though

(*x*) *Fearne*, 3rd edition, 393.

(*y*) *Rogers v. Gibson*, Amb. 93.

(*z*) *Tracts on Cross-Remainders, &c.*

it may be released or extinguished by the act of the owner of that interest, it cannot be barred by any person who has a title under a prior estate or interest of the testator (*a*).

The instances of executory devises which are annexed to estates-tail, in derogation, or abridgment, or defeazance of such estates-tail, must be excepted. Such executory interests may be barred by the common recovery of tenant in tail, as being interests collateral to the estate-tail.

Mr. *Fearne's* proposition (*b*), that every executory devise, so far as it goes, creates a perpetuity, that is, an estate unalienable till the contingency be determined one way or the other; and his observation, that it is a rule, that an executory devise cannot be prevented or destroyed by any alteration whatsoever, in the estate out of which, or after which, it is limited, must be read with this qualification (*bb*).

All conditional limitations owe their effect either to the learning of uses, or of trusts, or of executory devises, as far as these limitations are to have effect, in derogation or abridgment of an estate previously limited.

As tenant in tail may bar the estate tail, and when he can suffer a common recovery, all remainders expectant on his estate, the law allows of limitations by way of remainder after the failure of issue, or more correctly speaking,

(*a*) *Fearne* 306.

(*b*) *Ibid.* 315.

(*bb*) See *Butler's Fearne* 423, accord.

after the determination of an estate-tail; being an estate which may continue till the failure of issue, general or special; for as the estate-tail and the remainder may be barred, there is no danger of a perpetuity.

As a deduction from the same principles, the law, as applied to executory devises, shifting uses, and corresponding trusts, admits of any limitations, to take effect in derogation and abridgment of an estate-tail, without regard to the time at which these limitations are to operate (*c*). As these collateral limitations may be barred by the recovery of tenant in tail, the danger of a perpetuity is avoided.

Thus, as to executory devises, shifting uses, and corresponding trusts, a limitation to *A*, and the heirs of his body, remainder to *B* in fee; and if at any time *A* or the heirs of his body shall succeed to a particular farm, then the estate of *A* shall cease, and the lands shall remain to *B*, or to *D* and his heirs, in tail, or in fee, is a good limitation, either by way of executory devise, or springing use, or corresponding trust, though it be not to take effect within the limited period prescribed by the rules against perpetuities. The reason of the decision is, the limitation over is subordinate to an estate-tail, and may be barred by a

(*c*) *Nicholls v. Sheffield*, 2 Bro. Ch. Cas. 215.

common recovery suffered by the tenant in tail.

It is also observable, that a limitation by way of executory devise, or shifting use, or corresponding trust, may be good as to one estate, and void as to another estate.*

Thus the limitation may be good while the estate-tail is in continuance, and void when the remainder in fee is liberated from the prior estate-tail. As the gift may be barred by the owner of one estate, and therefore, has no tendency to a perpetuity, it is good; but as it cannot be barred after the determination or failure of the estate-tail, it then has a tendency to a perpetuity, and will be void.

For these reasons, it seems that the common power of sale and exchange in marriage settlements and wills, though not prescribed to be exercised within a given period, is good as to the estates for life, because, as to them the power falls within the limited period; and also as to estates-tail, because the power may be barred by any tenant in tail; and is void as to the remainder or reversion in fee, when it falls into possession, or is discharged from the estates-tail; so that the power will fail when the particular estates, perhaps when the estates-tail, shall determine. This point requires very minute investigation.

* There is not any decision to this effect.

In these observations, it is assumed, that the power is given to be exercised indefinitely, and not to be exercisable within a circumscribed and limited period, falling within the rule against perpetuities.

But some doubts having been entertained by eminent men, and among them Mr. *Fearne*, whether such a power, if indefinite in point of time, would be good, they sometimes added a restriction to this power, requiring that the power should be exercised during lives in being, and twenty-one years from that *period*.

With the exception which has been noticed, the rule against perpetuities requires that every limitation by way of executory devise, or springing or shifting use, or trusts of a corresponding nature, should be so limited that it may take effect in interest, within the period of a life or lives in being twenty-one years, and the time of gestation; and this period of gestation is now extended to the commencement, as well as the determination, of the period (*d*).

This rule is adapted to the nature and power of alienation, conferred by limitations of the common and ordinary form usually introduced into settlements; and under which the lands may be limited to *A* for life, remainder to trustees, during his life, remainder to his first and other sons in tail, with remainders over; so that the power of alienation may be

(*d*) *Long v. Blackall*, 7 Term Rep. 100.

suspended during the life of *A*; or during several lives, if there are several tenants for life, and till the first son of *A* shall be of the age of twenty-one years; and as this first son may be in *ventre sa mère*, at the death of his father, the power may be also suspended during the period of gestation, in addition to the term of twenty-one years; and the law, as already observed, also allows of two periods of gestation, one at the commencement, the other at the end, of the term (*e*)

The deductions from this rule are,

1st, An interest limited to commence on the indefinite failure of issue of *A*, as a substantive and independent limitation, is void, as too remote in its creation, and as transgressing the period allowed by law.

But a limitation on the failure of the issue of *A*, to whom an estate-tail is given, or in case *A*, the testator's heir, shall die without issue, will be good as a remainder expectant on an estate-tail.

In the latter instance, an estate-tail will be raised to the heir by implication and construction of law.

And sometimes the effect of the limitation over will be to abridge the prior interest, and to convert it into an estate-tail. In this mode the limitation over will be good, as a devise to *A* and his heirs forever; and if he shall die

(*e*) *Long v. Blackall*, 7 Term Rep. 100.

without heirs of his body, or without issue, to *B* in fee; for *A* has merely an estate-tail.

So if a devise be to *A* and his heirs for ever; and if he shall die without heirs, then to *B* in fee, this devise, though, generally speaking, void, as too remote, will be good if *B* should be in the line of succession to *A*, and inheritable to him (*e*), or *A* should be a denizen (*f*), or a bastard; so that the word heirs must (to render the limitations consistent,) be construed as used in the sense of the words ‘heirs of the body;’ and consequently create an estate-tail.

This exception, however, is not admissible in reference to leasehold or personal estates, unless the interests are in their nature circumscribed in duration by lives (*g*).

So if *B* has an estate-tail, with remainder or reversion in fee to *C*, and *C* devises the lands to *A*, from and after the failure of the issue inheritable to the estate of *B*, this will be a good and present devise of the remainder or reversion in fee; because the words of limitation do, in reference to and as connected with the prior estate, merely designate the time at which the estate is to commence in possession; not to the time at which it is to commence in

(*e*) *Parker v. Thacker*, 3 Lev. 70; and *Essay on Estates*, chap. Tail.

(*f*) 3 Bulstr. 195; 3 Leon 111, arg.

(*g*) *Cotton v. Heath*, 1 Roll. Abr. 612; *Oakes v. Chalfont*, Pollexf. 38; *King v. Cotton*, 2 P. W. 608; *Roe v. Jeffery*, 7 Term Rep. 596; *Doe v. Lyde*, 1 Term Rep. 597; 3 Atk. 449.

interest (*g a*). In effect they pass the immediate reversion or remainder. But in this case, the time marked by the particular limitation must, in terms, or in sound construction, be that precise time which will cause a determination of the prior estates (*h*). For if the prior estate is to determine on the failure of issue male, or on the failure of the issue by a particular woman, or on the failure of issue generally, and the limitation in question is independent of that event, it will be considered as a substantive and independent gift, and therefore too remote (*i*).

So if a limitation by way of executory devise, or shifting use, be merely *for life*, it cannot be too remote; since in the nature of the case it must fail or take effect within a reasonable period, *viz.* a life in being (*k*).

So if, from the *nature* of the property, the interest cannot be too remote, a limitation over will be good in whatever words it shall be expressed.

Thus, if *A* has an estate for three lives, or for years determinable on the death of three persons, or for three lives and twenty-one years, as in the Liverpool leases; every limitation of this interest by way of executory devise or

(*ga*) *Badger v. Lloyd*, 1 Lord Raym. 523.

(*h*) *Tenny v. Agar*, 12 East 253.

(*i*) *Lady Lanesborough v. Fox*, cases Temp. Talb. 262.

(*k*) *Roe v. Jeffery*, 7 Term Rep. 596, and cases cited at
(*g*) p. 161.

trust, or as to the freehold interest, by way of shifting use, will be good; and even though there exist a right of renewal, or a tenant-right, the limitation will not, on account of the right of renewal, or on account of the tenant-right, be too remote, and therefore void. At least, such was the opinion of the judges on the argument of *Mogg v. Mogg* (*l*), though the point cannot be considered as fully and deliberately decided.

A limitation which is to wait for effect for any period which may not happen within a life or lives in being, twenty-one years, and the time of gestation, is also too remote, and on that account void.

Thus, under a devise to *A* for life, remainder to his unborn son in fee; and if such unborn son shall die under the age of twenty-five years, to *C* in fee (*m*), the gift to *C* is void.

So a devise to the first son of *A* (not having any son,) who shall be in priests orders, is also void; for no one can be *in priests orders* by the ecclesiastical laws of this country till he shall be twenty-four (*n*).

For in one case the limitation might be suspended from giving a vested interest for twenty-five years beyond a life in being; and

(*l*) 1 *Merrivale*, 654.

(*m*) *Lade v. Holford*, Amb. 474. 3 Burr. 1418. 1 Bl. Rep. 428.

(*n*) *Proctor v. Bp. of Bath and Wells*, 2 H. Black. 358.

in the other case, for twenty-four years beyond a life in being, and is therefore too remote.

In a case from the court of chancery (*o*), and not reported, a person had a power of appointment in favour of his children. He made a will in exercise of his power. He appointed an aliquot part of the lands to his son in fee, and the other parts to his daughters in fee; and he added a proviso, that the aforesaid directions, &c. were upon the express condition, that, as to the marriage of his children, he directed that the same should be with the privity of his trustees, &c. And in case his son *Edward* should marry without such consent as aforesaid, before he attained his age of twenty-five years, then he should only be entitled to and receive his share, &c. for his own use, &c. for his natural life only, and to the issue of his body lawfully begotten, in such shares and proportions as he should by will or deed direct and appoint.

The judges [*Mansfield, Heath, Lawrence, and Chambre,*] in answer to the question, What estate did the plaintiff *Edward Salter Busby*, namely the son (who married before his age of twenty-five years without the privity and consent of the trustees,) take in one undivided third part of the messuages, lands, and hereditaments in the pleadings mentioned, under the power of appointment contained in the indentures of lease

(*o*) Of the name of *Busby v. Salter, and others.*

and re-lease of the 19th and 20th January 1770, (being the settlement containing the power) and the will of the said *Henry Busby*, the (donee of the power, dated 27th November 1788?) certified, that the plaintiff, *Edward S. Busby*, took an estate in fee in one undivided third part of the messuages, lands, and hereditaments in the pleadings mentioned, under the power of appointment contained in the indentures of lease and re-lease of the 19th and 20th January 1770, and the will of *Henry Busby*. The certificate is dated 27th November 1788.

This certificate must have been grounded on the principle, that such a limitation in the deed creating the power would have been too remote; and therefore was too remote in the will, as an appointment in exercise of the power.

To guard against the possible mischief and inconvenience of a departure from the rules of the common law, by allowing a suspension of the right and power of absolute alienation of the fee-simple, several rules, treated as *rules against perpetuities*, have been adopted by the courts by way of regulation, fixing the limits to executory devises, springing and shifting uses, and trusts of a similar nature.

A gift, or trust, which limits successive life-estates to persons unborn, and to their descendants, is too remote; because it has a tendency to a perpetuity, by suspending the

ownership of the inheritance in property held for an estate of inheritance ; and the absolute interest in other property, for an unreasonable period.

But in some cases, as in wills, and perhaps in trusts of the executory kind, the courts will, on the foundation of the general intention, construe the gift to the children to be part of the gift to the parent, and give him an estate-tail, corresponding, in measure and extent, with the gift to his issue (*p*).

Formerly it was understood that a person unborn was incapable of taking an estate for life.

It is now agreed that a person of this description may take such estate ; but all limitations over to descendants of such person, as purchasers, are too remote, and for that reason void ; unless the intended words of purchase can, by the doctrine of *cy pres*, be construed as words of limitation, or the nature of the interest excludes the danger of a perpetuity.

But the doctrine of *cy pres* is not admitted

(*p*) *Humberston v. Humberston*, 1 Peere Wms. 332 ; *Hopkins v. Hopkins*, 1 Atk. 593 ; *Hucks v. Hucks*, 2 Ves. 568 ; *Spencer v. Duke of Marlborough*, 5 Bro. Parl. Ca. 592 ; *Chapman v. Brown*, 3 Burr. 1626 ; *Robinson v. Hardcastle*, and others, 2 Term Rep. 241 ; *Nichol v. Nichol*, 2 Black. Rep. 1159 ; *Somerville v. Lethbridge*, 6 Term Rep. 213 ; *Seaward v. Willock*, 5 East 198 ; *Hayes v. Ford*, 2 Black. Rep. 700 ; *Pitt v. Jackson*, 2 Bro. Ch. Ca. 51.

in limitations by deed of the legal estate, nor in limitations even in wills of leasehold or personal estate (*q*).

Nor is the doctrine of *cy pres* applicable when there is a "*single intention*," as distinguished from a general intention.

The case of a *single intention* is exemplified in the instance of a gift (*r*) to *A* for life, and after him, to his eldest or any other son after him for life, and after him, to as many of his descendants (issue) as shall be heirs of his or their bodies down to the tenth generation, during their natural lives. But it seems to have escaped the judges, that there may be an estate-tail of a limited nature; an estate descendible to heirs of the body for one degree, or in the first line of succession only.

Also, if from the nature of the interest, the successive limitations for life are to have effect within lives in being, and twenty-one years, they will be good although the issue of persons unborn are to have life interests.

Several other propositions must be advanced to understand the rule with all its qualifications :

1st, A limitation to the unborn child of a person in being is good, whenever the estate

(*q*) *Somerville v. Lethbridge*, 6 Term Rep. 213.

(*r*) *Seaward v. Willock*, 5 East 198.

limited to the child is *for his life*, or gives him an estate of inheritance (*s*).

A limitation to a grandchild, or more remote issue, is good, if there be a provision that the child shall be born within the time limited by the rule against perpetuities (*t*).

3dly, A limitation to a person unborn, with (*u*) superadded limitations to his first and other sons, is good, so far as relates to the child, and void, as to his sons, as purchasers ; and all limitations over are too remote, unless the child be tenant in tail under the doctrine of *cy pres*.

4thly, The time of computation in deeds is from the execution, and in wills, from the death of the testator.

5thly, Estates for life, created in favour of persons to be the children of successive generations, is void as to those who will not necessarily be born within the period prescribed against perpetuities (*x*).

6thly, There appears to be reason for a difference between remainders, executory devises, and springing uses ; for a remainder after an estate for life to the unborn children of an unborn person, may be good, provided the common ancestor take no estate ; since

(*s*) *Blandford v. Thackerell*, 2 Ves. jun. 238, 3 Term Rep. 87; *Adams v. Adams*, Cowp. 657; 2 Ves. jun. 366; *Brudenell v. Elwes*, 1 East 442; 7 Ves. 382.

(*t*) 2 Ves. jun. 366.

(*u*) *Adams v. Adams*, Cowp. 657.

(*x*) *Humberston v. Humberston*, 1 P.W. 332.

as a remainder it must vest or fail of effect within the time limited by the rule against perpetuities (*y*).

7thly, In deeds, all the ulterior limitations which are remote beyond the period allowed by law, are void (*z*).

8thly, In wills to answer the general intention, the parent, who is the stock of the intended succession, and to whom an estate for life is limited, will take an estate-tail, corresponding with the limitations to his children and their issue, unless chattel interests in the nature of estates for life are limited (*b*).

9thly, And a power to suspend the right of enjoyment by a person unborn till twenty-five is void (*c*).

10thly, So is a power to trustees to revoke estates tail limited to persons unborn, and on their births to limit to them estates for life, with remainders to their children (*c*).

11thly, A power to appoint in favour of grandchildren, or issue, will be good, though they are not directed to be born within a limited time, so as the person exercising the

(*y*) 4 Ves. jun. 681.

(*z*) *Rouledge v. Dorrel*, 2 Ves. jun. 356; *Adams v. Adams*, Cwp. 657; *Brudenell v. Elwes*, 1 East 442.

(*a*) *Humberston v. Humberston*.

(*b*) *Somerville v. Lethbridge*, 6 Term Rep. 213.

(*c*) *Holford and Lade*, Ambl. 479; *Spencer v. Duke of Marlborough*, 5 Bro. Parl. Ca. 592.

power appoints to persons capable of taking within the rule against perpetuities (*d*).

12thly, But an actual limitation to the grandchildren, or issue, being the unborn issue of a child not in being, would, without such restriction, be void (*e*).

13thly, It should seem that estates may be limited to the unborn child of an unborn child, if the child in the first degree take a special estate-tail, since there is not any danger of a perpetuity (*f*).

Though a limitation over, after, and expectant on, a limitation which is too remote, is, generally, for that reason, void; yet, if in express terms the limitation over is to take effect, or to fail within a time to fall within the rule against perpetuities, the limitation over will be good (*g*).

The next rule is, that whenever one limitation by way of executory devise, or shifting or springing use, is too remote, all other limitations, as far as they are made by way of remainder, and expectant on that interest, are also too remote, and therefore void.

Thus, if a limitation be to one for life, remainder to his first son unborn, for ever; and if such son should die under the age of twenty-five years, then to *B* in tail, remainder to *A*

(*d*) *Hockley v. Mawbey*, 1 Ves. jun. 150; *Routledge v. Dorrell*, 2 Ves. jun. 357.

(*e*) 2 Ves. jun. 357; *Baldwin v. Karver*, —— Cowp. 309.

(*f*) *Nichol v. Sheffield*, 2 Bro. Ch. Ca. 215.

(*g*) *Crompe v. Barrow*, 4 Ves. jun. 681.

for life, with remainders over, this limitation to *B* is too remote; and, as a consequence, the gift to *A*, and all the remainders expectant thereon, are also too remote.

But some limitations are with a double aspect: they are to take effect either expressly, or by construction of law, on each or either of two events; and such limitations may be good in one event, though they are too remote in the other event.

Thus, if a term for years be bequeathed to *A* for life, and after his death to his first and other sons unborn, successively, and the heirs of their bodies; and on failure of such issue to *B* for life, and after his death to his first and other sons successively, and the heirs of their bodies, these limitations to *B*, and his first and other sons, as depending on, and to take effect, after the failure of the estates of the first and other sons of *A*, (being merely chattel interests, and consequently not creating estates-tail) are too remote, and therefore void.

But the law foreseeing that there may not be any child of *A*, considers the limitation to *B*, and his first and other sons, as intended to take effect, in the event that there should not be any child of *A*; and it construes the limitations in the same manner as if penned in these terms; and the limitation is good in the alternative, that there shall not be child of *A*. [See Tracts on Cross-Remainders, in the chap on Contingencies, with double aspect.]

The like conclusion would be drawn if the limitation had been in express terms to operate on either of two contingencies; and it were not too remote in one of these contingencies, though it were void as being too remote in another of them.

Another rule respecting these executory or future limitations, is, that a limitation which is too remote in its creation, cannot become good, even although the event should happen in the life-time of the testator, or within any other period (*h*).

Another rule is, that a limitation by way of gift to *A*, with a separate gift to the heirs of his body, under which they would take by way of limitation or descent, cannot, by the death of *A* in the life-time of the testator, convert the words, 'heirs of his body,' into words of purchase (*i*). But a limitation, originally made by way of contingent remainder, as to *A* for life, remainder to the first and other sons unborn of *B* in tail, and which, from a change of circumstances in the life-time of the testator; as the death of *A*, before the birth of a son to *B*, cannot have effect, as a remainder, may have effect as an executory devise. But a limitation once operating as a contingent remainder, can never, after the death of a testator, be changed into an executory devise.

But a limitation, originally taking effect as

(*h*) *Brett v. Sawbridge, et al.* 4 Bro. Par. Cas. 244.

(*i*) *Hodgson v. Ambrose*, 1 Dougl. 337.

an executory devise, may, by a change of circumstances, become a contingent remainder, as to *A* (from and after next Michaelmas) for life, remainder to his first and other sons in tail.

Till Michaelmas the gift operates by executory devise. After Michaelmas, and when the estate of *A* is vested, provided it does vest, the interest of the first son will be a remainder either vested or contingent.

In this place also, it must be observed, that if an estate held for lives be limited by way of strict settlement, and by way of entail, for it cannot, in strict propriety, be entailed; as to *A* for life; and after his death to his first and other sons, and the heirs of their bodies; these limitations partake of the nature of remainders; and the *quasi* tenant in tail may, by surrender, lease and re-lease, fine *sur concessit*, and it should seem, (but this is doubtful) (*k*), even by devise, bar the right of his issue, and those in remainder.

A person who has a *quasi* estate-tail in chattel-real or personal estate, is considered as the absolute owner, if the limitation over be to take effect on an indefinite failure of his issue. But if the limitation over be on an event which may happen within the period limited by the rule against perpetuities, this limitation over will be good, and cannot be defeated by any act of the owner under the prior limitation, except such act is the event, or one of the

(*k*) 1 Vol. p. 402.

events, by which the limitation over is to be defeated, or fail of effect.

Sometimes leasehold and personal estates are settled, by way of reference to uses in strict settlement of real estate, or as heir-looms to go with the real estate, as far the rules of law and equity will permit. The first tenant in tail (*l*) will have an absolute interest on his birth, except there be words which give to a court of equity the power of modifying the trust (*m*), and of suspending the right to an absolute interest, unless the tenant in tail shall attain twenty-one.

It is settled, that when the *quasi* tenant in tail of an estate for lives is seised in possession, he may bar his issue and the remainders; and it should seem he may do this even when his estate is a remainder, after a prior life-estate. This was the opinion of Lord *Alvanley*. But there are respectable opinions doubting this point.

This power of alienation was probably allowed originally with a view to cases in which there existed a tenant-right, so that there might have been a perpetuity, unless there were some means of barring the limitations over.

3dly, *As to Trusts for Accumulation.*

Until the statute of 39 and 40 Geo. III. c. 98, *Thellusson's act*, the period prescribed for trusts

(*l*) *Foley v. Burnell*, Cowp. 435, 1 Bro. Ch. Cas. 274.

(*m*) *Duke of Newcastle v. Clinton*; 2 Ves. jun. 387; 12 Ves. 218.

for accumulation was the same as that by which executory devises and shifting uses were regulated. But now by the statute of 39 and 40 Geo. III. c. 98, intituled, "an act to restrain all trusts and directions in deeds or wills, whereby the profits or produce of real or personal estate shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited," and which received the royal assent on 28th July 1800.

After reciting that it was expedient that all dispositions of real or personal estates, whereby the profits and produce thereof were directed to be accumulated, and the beneficial enjoyment thereof should be postponed, should be made subject to the restrictions thereafter contained.

It was enacted, that no person or persons should, after the passing of that act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise, howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, should be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator; or during the minority or respective minorities of any person or persons who should be living, or in *ventre sa mère*, at the time of the death of such grantor, devisor,

or testator ; or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce, so directed to be accumulated ; and in every case, where any accumulation should be directed otherwise than as aforesaid, such direction should be null and void ; and the rents, issues, profits and produce of such property, so directed to be accumulated, should, so long as the same should be directed to be accumulated contrary to the provisions of that act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed.

With a proviso, (sec. 2,) that nothing in that act contained should extend to any provision for payment of debts of any grantor, settler or devisor, or other person or persons ; or to any provision for raising portions for any child or children of any grantor, settler or devisor ; or any child or children of any person taking any interest under any such conveyance, settlement or devise ; or to any direction touching the produce of timber or wood upon any lands or tenements ; but that all such provisions and directions should and might be made and given as if that act had not passed.

With a further proviso, (sec. 3,) that nothing

in that act contained should extend to any disposition respecting heritable property within that part of Great Britain called Scotland.

And a further proviso, (sect. 4,) that the restrictions in that act contained should take effect, and be in force, with respect to wills and tenements made and executed before the passing of the act, in such cases only where the devisor or testator should be living, and of sound and disposing mind, after the expiration of twelve calendar months from the passing of that act.

To understand this act properly, it will be necessary to advert to the learning concerning executory devises, future uses, and future trusts; and the rules established against perpetuities, for the purpose of prescribing the boundaries within which these executory devises, future uses, and future trusts, must be confined.

The general rule, as has been shown, is, that any limitation may be made by way of executory devise, &c. so as the same be to take effect within a life or lives in being, including among those lives children then in *ventre sa mère*, and twenty-one years beyond the death of such life or lives, and the time of gestation; so as to allow for the birth of a child in *ventre sa mère*. In short, this rule against perpetuities is framed from an analogy to settlements made on marriage, in which the children of the marriage are generally made tenants in tail; so that the power of aliening the inheritance may be suspended till twenty-one years, after the death of

the survivor of the persons made tenants for life.

Under this rule prescribing the boundaries to limitations by executory devise, it was in the power of the owner of the estate to suspend, not only the ownership of the inheritance for the limited time, but also to suspend the right to the intermediate enjoyment, so as to accumulate the income, and add it to the principal, and thus aggrandise the remote issue of the family, at the expense of the present generation, and, perhaps, the two or three succeeding generations.

Availing himself of this rule, Mr. *Thellusson* fixed on the lives of all his sons, and all his grandsons born in his life-time, or who should be living at his death, or then in *ventre sa mère* (for such seems to be the construction of his will,) as the period during which the income of his immense property should accumulate, for the benefit of those branches of the respective families of his sons, who at the end of that period should answer the description of the heirs male of the respective bodies of these sons; thus dividing his property into three parts, and giving one third part to the family of each son.

The calculation is, that this period of accumulation will continue for seventy or probably eighty years; and if it should happen that the person then answering the requisite description should be an infant, the accumulation would

necessarily continue till that person shall be adult, and this may be for another period of twenty-one years; so that if this event should happen, every 100*l.* of the fortune of Mr. *Thellusson* will, at the end of a century, be increased an hundred fold; and during all that time, the increase will be withdrawn from all the useful purposes of commerce; and the right of absolute alienation will be suspended.

This will being considered as an abuse of the rule of law, and a contrivance to avoid its principle, though it kept within its letter, the act in question was passed as a protection against attempts of a similar nature.

It must be observed, that the act does not in any manner affect the rule respecting the settlement of the property as property; or the principle itself; but it merely regulates the extent to which the income may be accumulated.

Instead, therefore, of its being left to the power of a party to create a trust for accumulation during lives in being, and twenty-one years, and the period of gestation (as he might have done at the common law), he is now restrained, except in particular cases, from creating a trust for accumulation to continue for any further period than,

1st, During his own life.

2dly, For twenty-one years from his own death.

3dly, During the minority of any person living at his death, or then in *ventre sa mère*.

4thly, During the minority of any person who for the time being would be entitled to the rents, &c. if of age.

1st, He is at liberty to select any one or more of these periods for the purpose of accumulation; or he may adopt each of them, if such be his wish; but all inconvenience is avoided by these different restrictions; for, in the first place, no just policy could restrain a man from saving his income, instead of spending it, during his life.

2dly, The trust for accumulation during twenty-one years certain from his death, is the only period which can be considered as a direct accumulation; but this period seems to have been allowed merely to take away the encouragement of giving to an infant, rather than to an adult; as an option of adopting a definite and precise period of accumulation during the utmost period of minority, instead of a gift to an infant, as a means of obtaining the right to accumulate.

3dly, The right to accumulate during the minority is founded on the idea, that if the minor had the beneficial ownership, the income, &c. except as far as was necessary for maintenance, would accumulate during the minority; so that no more is done by the party under this power of accumulation, than would be

done under the rules of law, if such power of accumulation was denied to him.

But as this provision may be made as well during the minority of a stranger, as during the minority of any person to whom the property is limited, it is considered, with reference to a stranger, merely as an alternate or concurrent right to that of accumulating for a direct period of twenty-one years; since, if both periods were named, they necessarily must be concurrent.

4thly, This provision is founded on the same principle as the former. Indeed there is no difference in the two provisions, except that one is for the minority of a person living at the death of the settler, &c. while the other is for the minority of any person who may afterwards become entitled to the estate, &c.

The exceptions are,

1st, To provisions for payment of the debts of the grantor, settler, or devisor, or the payment of the debts of any other persons; and this trust cannot be considered as a trust for accumulation. Instead of saving the income for persons not ascertained, it gives the income to creditors in discharge of the debts owing to them, and thus places the income in a channel in which it may have circulation; so that in fact the income is given to the creditors, which, as far as the policy of the law is concerned, is full as beneficial as if it were given to any of

the family of the settler, and even more beneficial than if it were so given.

2dly, To provisions for raising portions for any child or children of any grantor, &c. or of any person taking any interest under any such conveyance, &c. This exception seems to have proceeded, in a great degree, on the same principle as the former exception, with the additional circumstance, that the nobility, &c. must have disposed of their landed property to raise portions for their younger children, or the children of those for whom they were providing, unless they were left at liberty to make this provision by a trust of accumulation; but this exception admits of a latitude which may be productive, in a great degree, of all the inconveniences which were felt or apprehended under the rules of the common law; because by a will or settlement artfully prepared, every purpose aimed at by Mr. *Thellusson* may be accomplished.

3dly, To provisions or directions touching the produce of timber or wood.

This exception was probably added partly to encourage the growth of timber; but principally on the ground that a long period of time must elapse before timber can arrive at its maturity; also, that timber is considered by the generality of owners of estates, merely as a resource for some particular occasion; as a provision for the portions of children, for pay-

ment of debts, and the like, and not as a source of income ; so that any direction concerning timber, and circumscribed within the rule against perpetuities, cannot be considered as withdrawing from the owner for the time being, any part of the income of the estate.

Besides, by the rules of the common law, as well as the law of this day, the owner for the time being, unless he be the owner of the inheritance, has not any power over the timber, except for repairs, &c. unless that power be expressly given by the settlement, under which he becomes the owner for a limited time.

In future, whenever a trust for accumulation shall be attempted, care should be taken to keep in view, the different periods of limitation marked by the statute, and, in the most explicit and definite terms, to steer within the boundaries marked by the statute ; and also to keep within the rule against perpetuities. An excess in the limits of time for accumulation will, in the whole or in part, render the trusts for accumulation void ; and any transgression of the rule against perpetuities will render *the gift* itself void. But if *several periods* of accumulation are fixed, and they are distinctly marked, some may be good, and the others void.

It is now decided, that in a case falling within the statute the time of accumulation though entire, may be apportioned ; so that part of the trust may be sustained, though part, as contrary to the statute, may be void (*n*).

In *Southampton v. Marquis of Hertford* (*o*), the whole trust for accumulation failed, as contravening the rules of the common law.

And in *Leake v. Robinson* (*p*), Sir W. Grant, M. R. observed, "Perhaps it might have been as well if the courts had originally held an executory devise transgressing the allowed limits, to be void only for the excess ; where that excess could, as in this case it can,

(*n*) *Griffith v. Vere*, 9 Ves. 127; *Longdon v. Simson*, 12 Ves. 295.

(*o*) 2 Ves. and Beames 54. *Phipps v. Kelynge*, there cited.

(*p*) 2 Merivale 389.

be, clearly ascertained ; but the law is otherwise settled. In the construction of the act of parliament passed after the *Thellusson* cause, I thought myself at liberty to hold that the trust of accumulation was void *only for the excess* beyond the period to which the act restrained ; and the Lord Chancellor afterwards approved of my decision. But there the act introduced a restriction on a liberty antecedently enjoyed ; and therefore it was only to the extent of the excess that the prohibition was transgressed : whereas executory devise is itself an infringement on the rules of the common law, and is allowed only on condition of its not exceeding certain established limits. If the condition be violated the whole devise is held to be void".

In *Marshall v. Holloway*, before the Chancellor in June 1818, the distinction between the several cases was urged to the court. That case is not yet reported ; nor indeed has the judgment been pronounced, though the Chancellor has, subject to reconsideration, expressed his opinion.

Tenants of absolute Estates.

THE tenant of an absolute Estate has an interest which is not subject to any condition. The word absolute is a term for distinguishing his interest, from that of a person who has a contingent, executory, or conditional interest. And an interest, which originally was conditional or contingent, executory or defeasible, may, by a performance, or, as to vested interests, by a release of the condition, or the like, eventually become absolute or indefeasible.

On Titles under Conditional Estates.

- A distinction must be made between,
- 1st, Persons who are to take on a condition.
- 2dly, Persons who have an estate subject to a condition.
- 3dly, Persons entitled to the benefit of a condition.

Conditional limitations are part of the substance of the gift.

1st, Persons who take on a condition are persons having contingent or executory interests. Such persons cannot convey at law; they, however, may for a valuable consideration transfer their interests in equity (*p*). Such interests are also descendible and transmissible; or they may be devised, or extinguished by re-lease, or bound by estoppel.

2dly, Persons who have an estate subject to a condition may convey, &c. In short, they have the same seisin or ownership as other owners, subject only to the condition which gives a collateral quality to their estate, and renders the same defeasible. Their estate will continue defeasible till the condition shall be performed, or released, or discharged by becoming impossible, &c. &c.

The title must always be considered as subject to the condition, till the condition shall be performed or released, or till a right of entry shall have accrued, and that right shall be barred by the statute of limitations, or by nonclaim on a fine.

3dly, Of the persons entitled to the benefit of the condition.

By the common law, a condition could not be reserved to any one except the grantor or

his heirs, as to real estate, and to the grantor or his executors as to chattel interests.

By the statute of 32 Hen. VIII, c. 34, assignees of the reversion, subject to leases, &c. are enabled to take advantage of conditions annexed to leases for years or for *lives*; and by the bankrupt laws, the assignees under a commission of bankrupt are enabled to perform conditions reserved to the bankrupt.

The person entitled to the benefit of a condition to defeat the fee has no devisable interest. After a grant in fee he will not have any estate till the condition shall be broken, &c., and he shall have restored his estate by entry or by action. He may extinguish his right by making a feoffment, or levying a fine to a stranger (*q*); or he may re-release his right to the person who has the estate subject to the condition. He may also confirm an estate made by the person who is in the seisin; and thus give stability as against himself, his heirs, &c. to the estate conveyed to that person. Twenty years, except in cases of disability; and in that case, ten years after the disabilities are removed, seem to be the period within which a right of entry under a condition must be prosecuted. Cases of this sort are governed entirely by the enactment of the statute of 21 James I. c.

Thus it will be collected, that conditional estates are of two descriptions :

(*q*) *Buckler's case*, 2 Rep. 55.

1st, Estates which are to commence on a condition precedent:

2dly, Estates which are to be defeated by a condition subsequent.

In the former instance, the condition is properly a contingency. It forms part of the limitation of the estate; and the gift is properly called a conditional limitation; in other words, a limitation on a contingency.

These contingencies relate to the *commencement* of the estate; and, in proportion as the fact or event may be material to the title, particular care should be taken, that the event on which the estate was to commence, has happened according to the true construction of the words; and that it happened at such period as is requisite to support the title; and in the instance of contingent remainders, before the determination of the prior estate of freehold by which it was supported; and that in reference to the learning of springing and shifting uses, and executory devises, the gift was not exposed to the objection of being contrary to the rules of law against perpetuities.

All conditional limitations of freehold interests must necessarily be either contingent remainders, springing or shifting uses, or executory devises; except, perhaps, the single instance of an estate for years to be enlarged on condition: being a mode of gift known to the common law, and sanctioned by its rules.

Interests which are subject to a condition

to defeat the same, may be vested; subject only to be divested, and defeated by the condition. The condition is unconnected with the commencement of the estate, and relates wholly to the means by which the estate may be defeated.

Interests of this description are properly called estates subject to a condition. They arise from a limitation, or gift, with a condition annexed or superadded to the estate; and forming, either in fact or in construction of law, a distinct clause; so that there is in the first place a limitation of the estate, and secondly a condition to defeat the estate. It would be altogether inaccurate to term a gift attended with these circumstances, a conditional limitation.

Provisoes in common law grants, that the estate shall on some event be void, partake of the nature of conditions, and are classed amongst conditions; but provisoes of cesser in conveyances to uses are subject to some rules inapplicable to conditions at the common law.

At the common law, no one except the grantor, or his heirs, as to real estate; or his executors or administrators as to chattel interests, could take advantage of a condition (*r*).

And when a condition is annexed to a particular estate, and a remainder is limited, the

(*r*) Litt. § 347, 1 Inst. 214; Shep. T. 116. 146.

limitation of the remainder is, to the extent of that estate, a discharge or avoidance of the condition; because it disables the grantor or his heirs to take advantage of the condition (*s*).

But in conveyances to uses, a proviso of cesser may have, and frequently has, the effect to defeat the estate for the benefit of those in remainder; thus accelerating the right to the possession, under the title conferred by the remainder.

This is the scope of the common clause of provisoes of cesser annexed to terms for years in marriage settlements; and clauses for the cesser of an estate, on refusal to take a name, or bear arms, or on the accession of another estate; though, in the latter instance, a clause of limitation over for the benefit of those in remainder, is generally added.

Provisoies of shifting use, and also of executory devise which are to defeat a prior estate, partake partly of the nature of conditions, and partly of the nature of limitations (*t*). But they are rather considered as limitations, since they defeat the prior estates for the benefit of strangers; and the limitations over operate by way or in the nature of gifts of remainders; but these interests do not properly fall under the denomination of remainders.

The more leading rules respecting common-law conditions, are,

(*s*) Dr. Butt's case, 10 Rep. 41.

(*t*) Essay on Estates, introductory chapter.

1st, The condition must not be repugnant to the estate :

2dly, It must not be insensible, nor impossible :

3dly, It must not be to do an act which is *malum in se*, as to commit felony, &c. (*t t*)

4thly, It must defeat the whole estate, and not a part of it ; but it may defeat an estate in part of the lands ; leaving the other parts of the land unaffected by the condition : while conditional limitations may defeat part of the estate, as occurs in the cases of leases under powers ; jointuring powers, and executory devises, which defeat the estates partially.

5thly, A condition must not be to take effect on the event which is to determine the estate ; for this is the province of a limitation, and not of a condition (*u*).

6thly, A common-law condition must be reserved to the grantor or his heirs, &c. At the common law, an assignee could not take advantage of a condition. Nor could a condition have been reserved to him with effect, even though he had the reversion in respect of which the condition was to be exercised.

But now, by the statute 32 Henry VIII. c. 34, assignees, taking a reversion on a particular estate, to which conditions are annexed, may take advantage of these conditions. This statute extends to assignees of *part* of the

(*t t*) Shep. T. 129.

(*u*) *Essay on Estates*, introductory chapter.

estate, but not to assignees of *part* of the land (*x*). Hence a disadvantage in the subdivision of lands in the same lease, on a sale thereof in parcels.

7thly, At the common law no remainder can be limited, so as to enable the grantee to take advantage of the condition annexed to a prior estate. And a remainder limited at the common law, on the event expressed in the condition which is to defeat the estate, is, in effect, to reserve the condition to a stranger, and this, as has been shown, is not allowed by the rules of the common law.

But even by the rules of the common law a remainder may be limited, to commence on that event which is to cause *the actual* determination of the particular estate, and forms part of the limitation. As to *A* and his assigns, till his return from Rome, and after his return from Rome, then to *B*. This is a good contingent remainder (*y*).

Also, by way of executory devise, or shifting use, an interest may be limited to commence on the event which is to defeat a prior gift, or estate. But this is allowed under those rules which are proper to executory devises and shifting uses.

The like indulgence is also allowed to limitations by way of trust. In short, whatever may be accomplished by way of executory devise,

(*x*) 1 Inst. 215.

(*y*) 1 Fearne, p. 3. 3 Rep. 20 a; *Arton v. Hare*, Poph. 97.

or springing or shifting use, may be accomplished through the medium of a trust, considered as a trust.

A material part of the clause of condition is its conclusion, viz. the part which confers the right of entry, or declares that the estate shall, on the given event, be void ; for a clause cannot (*y*) operate as a condition, unless it has proper words of termination. The cases of condition, by construction of law, as conditions annexed to offices ; the conditions annexed by law to particular estates under which they may be forfeited, do not contravene this doctrine.

The doctrine of conditions is particularly important to the conveyancer. It embraces a large portion of learning, with which it is his duty to be intimately acquainted.

He must make himself conversant with the distinctions between negative and affirmative conditions ; between conditions which give a right of re-entry, and those which declare the estate to be void ; between conditions annexed to estates of freehold, and conditions annexed to chattel interests ; between conditions in the disjunctive, and conditions in the conjunctive ; and, above all things, he must carefully distinguish between conditions precedent ; in other words, conditional limitations, in conveyances at the common law, and in wills,

(*y*) Except as to terms for years; Shep. Touch. chap. Conditions.

and declarations of use, &c. and conditions subsequent ; in short, those clauses which are properly called conditions.

He must again also distinguish between conditions, properly so called, and which will have, or may have, the effect to defeat the estate ; and agreements for redemption, which are frequently mere agreements to reconvey, and not conditions, in the technical sense of that term. The title to the legal estate may frequently turn on this distinction.

He should also learn that some conditions are void in their inception, *because they stipulate for that which is impossible* ; as, to *A* in fee, subject to be void if he should go from London to Rome in one hour ;

Or that *which is repugnant to the language of the grant* ; as, that a man, who is a lessee to him and his assigns, shall not assign ;

Or that *which is repugnant to the estate* ; as, that a tenant in tail shall not suffer a common recovery ;

Or that *which is illegal* ; as, a gift to *A* in fee, subject to be void unless he shall commit a felony ;

Or that *which is against the policy of the law* ; as, an unreasonable restraint on trade ; on marriage ; on the power and right of alienation ; or a stipulation for that which is immoral.

As the grant was to the lessee and his assigns, the condition which restrained his assignment generally, was repugnant. Had not the grant

been to his assigns ; or had the restraint been on assignment without consent or license, or on assignment to particular persons, or to any person, except particular persons, the condition would have been good ; because there would not have been any repugnancy between the grant and the condition.

Though a condition, which restrains tenants in fee from all power of alienation, or tenant in tail from suffering or attempting to suffer a common recovery, is void, yet tenant in fee may be restrained from aliening to particular persons, &c. ; and tenant in tail may be restrained from making a wrongful and tortious alienation ; as a discontinuance not being a bar.

So a condition which, for a consideration, restrains a person from carrying on trade within a certain reasonable district ; or which restrains marriage to a particular person, or under a given age ; or to a person of a given country, as Scotland ; will be a valid condition.

Again, other conditions, though good in their creation, become void by reason that the act required to be done or omitted, is rendered impossible by the act of God ; or by the act of the party entitled to the benefit of the condition, &c.

Whenever a condition is material to the title, care should be taken that it has been either dispensed with (*z*), or that it has been

(*z*) *Dumport's case*, 4 Rep. 120.

released, or has been performed, or has failed of effect; or that the circumstances of the title afford a presumption that the condition is discharged.

The length of time which has elapsed often renders such presumption irresistible; because the fact does not admit of any investigation which would lead to a moral certainty.

In regard to conditional limitations, care should also be taken that the event has happened on which the estate was to commence; or, as the circumstances of the case may require, that the event on which an estate was to arise, has failed.

And as to terms for years, whenever it is alleged, that the proviso of cesser has operated to defeat the estate, it should be seen that some or one of the events, designated by the proviso of cesser, has happened; and that the event alleged to have taken place, falls within the scope and true construction of the words of that proviso. This point requires more attention than is usually bestowed on it.

Titles involved with conditions to defeat the estate, also require this further consideration :

When the condition shall operate it will defeat the estate in all the lands subject to the condition, and all the derivative estates and interests carved out of the estate of the grantee, or other person to whose estate the condition was annexed (*a*).

(*a*) Shep. Touch. 151.

Thus a purchaser or owner of part of the lands, may have the estate defeated by the act or default of the owner of other part of the lands.

And an under lessee, &c. may have his estate defeated by the act or default of the original lessee, or his assignee. Hence the caution, frequently necessary, in investigating titles under leases, when there is a subdivision of property by assignments to different purchasers, or by under-leases of distinct parcels.

In these particulars there is a difference between an express condition, and a condition in law; for if a lessee for life or years surrender his estate, or makes a tortious alienation by which he forfeits that estate, his surrender or forfeiture will not implicate those who have estates or charges derived under his title.

Thus, if lessee for life make a lease for years, and after enter on the lessee, and make a feoffment, this forfeiture will not prejudice the lessee for years (*b*).

Hence the observation of lord *Coke*, “ And it is to be observed, that a condition in law, by force of a statute, which giveth a recovery, is in some cases more strong than a condition in law, without a recovery. For if lessee for life make a lease for years, and after enter into the land, and make waste, and the lessor recover in an action of waste, he shall avoid the lease before the waste done. But if

(*b*) *Shep. Touch.* 151; *Infra.* 199.

the lessee for life make a lease for years, and after enter upon him, and make a feoffment in fee, this forfeiture shall not avoid the lease for years. Nor, in any of the said cases, a precedent rent granted out of the land shall be avoided ; for if lessee for life grant a rent-charge, and after doth waste, and the lessor recovereth in an action of waste, he shall hold the land charged during the life of the tenant for life ; but if the rent were granted after the waste done, the lessor shall avoid it.

" And the reason wherefore the lease for years in the case aforesaid shall be avoided, is, because of necessity the action of waste must be brought against the lessee for life ; which, in that case, must bind the lessee for years ; or else by the act of the lessee for life the lessor should be barred to recover *locum vastatum*, which the statute giveth.

" If a man hath an office for life which requireth skill and confidence, to which office he hath a house belonging, and chargeth the house with a rent during his life, and after commit a forfeiture of his office, the rent-charge shall not be avoided during his life [qu. if the conclusion be law,] ; for regularly a man that taketh advantage of a condition in law, shall take the land with such charge as he finds it. And therefore *Littleton* (c) is to be understood, that a condition in law is as strong as a condition in deed ; as, to avoid the estate

or interest itself, but not to avoid precedent charges, but in some particular cases, as by that which hath been said, appeareth." The general doctrine is further elucidated in 1 Inst. 338 a.

Whoever wishes to understand the doctrine of conditions thoroughly, according to the rules of the common law, with all the various important distinctions which belong to this subject, will do well to read the chapter on Conditions in Comyn's Digest, and in Shep. Touchstone, chap. Conditions; 1 Inst. chap. Conditions.

Of Tenants under Defeasible Estates.

ESTATES may be defeasible either by reason of a condition, or a conditional limitation annexed to the estate, or a defect in the title under which there may exist a right of entry, or of action, in some other person.

Titles of this sort must be considered as defective, till the defect shall be supplied, or the right of entry, or of action, shall clearly and unquestionably be barred by non-claim on a fine, or under the statute of limitations, or, as to equitable interests, by the rules which courts of equity have adopted in analogy to the statute of limitations; or until the defect shall be removed by a re-lease, or confirmation, or some other assurance having that effect, from the persons in whom the right or title resides, and who are competent, in point of interest,

and also of age and personal qualifications to give such confirmation or re-lease.

Titles under derivative estates are of the same description. They are governed by the rule *cessante statu primitivo cessat derivativus*

This rule, however, must be understood with its proper qualifications. Some of these qualifications have already been stated; others of them will be found in the following quotation from Lord Coke (*d*) :

“ It is holden of some, that after the surrender” [by a tenant for life to the husband, seised in tail in right of his wife, and who discontinued the tail ;] “ the issue in tail during the life of tenant for life may enter; for that having regard to the issue, the state for life is drowned, and consequently the inheritance gained by the lease is, by the acceptance of the surrender, vanished and gone; as, if tenant in tail make a lease for life, whereby he gaineth a new reversion, as hath been said; if tenant for life surrender to the tenant in tail, the estate for life being drowned, the reversion gained by wrong is vanished and gone; and he is tenant in tail again, against the opinion, *Obiter of Portington*, 21 H. VI. 53.

“ But herein are two diversities worthy of observation; the first is, that having regard to the parties to the surrender, the estate is absolutely drowned, as in this case, between the lessee and the second baron.

(d) 1 Inst. 338 a.

“But having regard to strangers who were not parties or privies thereunto, (lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender,) the estate surrendered hath, in consideration of law, a continuance ; as if a reversion be granted with warranty, and tenant for life surrender, the grantee shall not have execution in value against the grantor, who is a stranger, during the life of tenant for life ; for this surrender shall work no prejudice to the grantor who is a stranger.

“ So if tenant for life surrender to him in reversion, being within age, he shall not have his age ; for that should be a prejudice to a stranger, who is become defendant in a real action.

“ If tenant for life grant a rent-charge, and after surrender, yet the rent remaineth, for to that purpose he cometh in under the charge, *causa quâ supra.*

“ If a bishop be seised of a rent-charge in fee, the tenant of the land enfeoff the bishop and his successors ; the lord enter for the mortmain, he shall hold it discharged of the rent ; for the entry for the mortmain affirmeth the alienation in mortmain, and the lord claimeth under his estate ; but if tenant for life grant a rent in fee, and after enfeoff the grantee, and the lessor enter for the forfeiture, the rent is revived, for the lessor doth claim above the feoffment. But if I grant the reversion of my tenant for

life, to another for term of his life, and tenant for life attorn, now is the waste of tenant for life disipnisable. Afterwards I re-lease to the grantee for life, and his heirs, or grant the reversion to him and his heirs, now albeit the tenant for life be a stranger to it, yet because he attorned to the grantee for life, the estate for life which the grantee had shall have no continuance in the eye of the law, as to him, but he shall be punished for waste done afterwards.

"The second diversity is, that for the benefit of an estranger, the estate for life is absolutely determined; as if he in the reversion make a lease for years, or grant a rent-charge, &c. and then lessee for life surrender, the lease or rent shall commence *maintenant*. So in the case of *Littleton*, first, between the lessee and the second husband, the estate for life is determined; and secondly, for the benefit of the issue, it shall be so adjudged in law. Here note a diversity, when it is to the prejudice of a stranger, and when it is for his benefit.

"If a man maketh a lease to *A* for life, reserving a rent of forty shillings to him and his heirs, the remainder to *B* for life, the lessor grant the reversion in fee to *B*; *A* attorn, *B* shall not have the rent; for that although the fee-simple do drown the remainder for life between them, yet as to a stranger it is in *esse*, and therefore *B* shall not have the rent, but his heir shall have it," namely, as annexed to the reversion.

Possibilities.

BECAUSE the owner of an executory interest has, while the interest remains executory, no estate, he cannot grant or assign at law (*f*).

There is one exception to this rule. The owner of an *interesse termini* may assign his interest in the term. But a person whose term is turned into a right of entry, cannot assign the term till he has restored his estate by his entry (*g*).

Of course, when the owner of an executory interest affects to assign that interest, the title, though it may be good in equity, will be defective at law, supposing the interest to be legal; and a further conveyance must be taken after the interest is executed; or a re-lease must be made to the person in whose favour an effectual re-lease may be taken.

In this particular, executory and contingent interests stand on the same footing; and the observations made with reference to the interests of one description, are equally relevant to the interests of the other description.

To sum up the material distinctions applicable to the owners of contingent interests: they may re-lease them by deed, except in case of entails, or feme covert. In case of entails or feme covert the re-lease must be by fine; and

(*f*) 10 Rep. 50; 4 Rep. 66 b.; 1 Inst. 266 a.

(*g*) *Stephens v. Harmam*, 3 Lev. 312.

in the case of entails the fine must be with proclamations. A married woman may also release by common recovery.

A common recovery, suffered by a person who has a contingent interest in tail, will be good to bind himself; but it will neither bar his issue, nor those in reversion or remainder.

Contingent interests in fee, or contingent interests, except entails, are devisable; they may also be bound by estoppel (*h*), or they may be bound in equity by contract.

But there are two species of estoppel, as will afterwards be noticed, one which gives an interest; the other which extinguishes a right:

Of the former description are grants by estoppel for terms of years; of the latter description are estoppels which apply to the whole interest.

In the instance of terms for years, the interest will be bound when it vests. In the case of other interest, the right will be extinguished (*i*).

It is therefore particularly important that a person who has a contingent interest in tail, or in fee, should carefully avoid the levying a fine, &c. or making a feoffment, unless there be an intention to extinguish the right to the inheritance. For the fine, feoffment, &c. will have the effect to extinguish the inheritance whatever may be the intention of the parties.

But here we must distinguish between con-

(*b*) *Weale v. Lower*, Polexf. 54.

(*i*) *Ibid.*

tingent interests of the legal, and contingent interests of the equitable, ownership.

Interests of the latter description, instead of being extinguished will be transferred, when such is the intention, notwithstanding the fine, &c. would, under similar circumstances, have extinguished the right to a contingent interest of the legal estate.

Titles under Possibilities, &c.

TITLES under possibilities and expectancies are of two descriptions :

- 1st, Possibilities coupled with an interest:
- 2nd, Possibilities without any interest.

A person who is *ascertained*, and who may take under the gift of a contingent or executory interest, or even under a condition annexed to a fee, or who has a *possibility of reverter* on a grant of a determinable fee, has a possibility of this nature.

Such possibility may be re-leased, though it cannot be granted. It may be extinguished by fine, &c. by estoppel. In most cases it is a devisable interest (*k*).

But a right to enter for a condition broken, or under the warranty annexed to an exchange (*l*) ; or the benefit of a condition, unless it be annexed to a reversion, is not devisable ; and, perhaps, a mere possibility of reverter is not devisable.

(*k*) *Roe and Jones*, 1 Hen. Blackst. 30.

(*l*) *Attorney General v. Vigor*; 8 Ves. 256.

These possibilities or expectancies which are not coupled with an interest, are not devisable or re-leaseable ; but all title under them may be excluded, or bound by estoppel.

Of this description are the expectancies of an heir apparent, or an heir presumptive ; or of persons, when the gift is to the survivor of them, and both are living ; also of persons who are to take under a gift to a class of persons not ascertained, as children who shall attain twenty-one, children who shall survive their parents, &c. (m).

But persons who may eventually become entitled under these or the like gifts, may bind themselves in equity by contract for a valuable consideration (n).

Titles under estoppels will fall very properly under consideration in this place.

Of Estoppels.

AN estoppel precludes the rightful owner from asserting his title.

Estoppels are of different sorts, and, to avoid confusion, they must be accurately distinguished.

There are estoppels,

1, In pleading :

2, In evidence :

3, In extinguishment of rights, &c. :

(m) See Infra.

(n) *Wright v. Wright*, 1 Ves. 409; *Bickley v. Newland*, 2 P. Wms. 182.

4, Binding by acceptance :

5, Which give a title against the rightful owner.

Estoppels in pleading do not fall within the scope of this work.

Estoppels in evidence preclude the party from giving any evidence contrary to an admission of the fact by *recital*, &c. Thus, if a bond recite a fact, and then the bond has a condition to do or omit some act, in reference to the fact, the truth of the fact cannot, at law, be controverted, though, as a general rule, a recital is no estoppel.

Estoppels in Extinguishment of a Right.

In *Buckler's case* (*o*) it was resolved, that “if disseisee levy a fine to a stranger, in this case the disseisor shall hold the land for ever; for the disseisee, against his own fine, cannot claim the land, and the conusee cannot enter, and [the] right which the conusor had cannot be transferred to him; but by the fine the right is extinct, whereof the disseisor shall take advantage.”

And Lord *Hale* observed (*p*), that fines and feoffments do ransack the whole estate, and pass or extinguish, &c. all rights, conditions, &c. belonging to the land, as well as the land itself.

Some gentlemen are inclined to entertain doubts of the soundness of the decision in *Buckler's case*.

(*o*) 2 Rep. 56.

(*p*) *King v. Melling*, 1 Ventr.

Though the point was questioned in *March Rep.* 105, yet there is such a volume of concurring authority in support of the resolution, that no lawyer investigating the subject can reasonably doubt on the point. The case of *Weale v. Lower* (*q*), and *Moore's* case (*r*), go the whole length of this resolution.

The doctrine of estoppels by fines, &c. is confined to legal rights, and does not extend to equitable rights or titles; except when there is an *intention* to extinguish the right or title.

It is clear that contingent executory interests may be bound by estoppel; as to legal interests without any intention; and as to equitable interests, when there is an intention of binding the interest.

Mere strangers to the fine, or other record, may take advantage of the estoppel, as to legal interests, rights and titles (*s*); but as to equitable interests, rights and titles, the fine, &c. can be used only as a species of re-lease, or other assurance.

As to Estoppel by Acceptance.

By accepting a lease by indenture, the person who is named lessee is precluded from denying the existence or validity of the lease. The plea of *nil habuit in tenementis*, is inadmissible on his part, or by his executors, administrators or assigns.

(*q*) *Pollexf.* 54.

(*r*) *Palmer*, 365.

(*s*) *Buckler's* case, 2 *Rep.* 56.

So if two persons are jointenants in fee, and they accept a fine to them, and the heirs of one of them, this is an estoppel against their right to contend that they have the fee in jointenancy (*t*).

The joint-tenancy is in general practice restored by a declaration of the uses declared of the fine.

As to estoppels which give a title against the *rightful* owner :

Estoppels of this description conclude future rights when they are acquired ; and they are binding on,

- 1, The parties :
- 2, Privies in blood, as heirs :
- 3, Privies in representation, as executors :
- 4, Privies in estate, as feoffee, lessee, &c.
- 5, Privies in law, as lord by escheat ; tenant by courtesy ; in dower ; incumbent of a benefice ; and they and others that come in by act in law, and in the *post*, shall be bound [by] and take advantage of estoppels ; and a *rebutter* is a kind of estoppel (*u*).

Married women and infants may bind themselves and their heirs by estoppel (*x*).

The rules respecting estoppels are collected in 1 Inst. 352 a.

The only rules which apply to the points now under consideration, are,

(*t*) Shep. Abrid. 2 pt. 85.

(*u*) 1 Inst. 352 b.

(*x*) Bro. Abr. Estoppel, pl. 98.

1st, Every estoppel ought to be reciprocal, that is, to bind both parties.

2dly, Every estoppel, because it concludeth a man to allege the truth, must be *certain to every intent*, and not to be taken by argument or inference. The rule is applicable to recitals and pleading.

3dly, Every estoppel ought to be a precise affirmation of that which maketh the estoppel, and not to be spoken impersonally, as, if it be said, *ut decitur, quia impersonalitas non concludit, nec ligat: impersonalis dicitur quia sine persona*; neither doth a recital conclude, because it is no direct affirmation. But a recital in a deed may be evidence, and may, in some cases, conclude, as in the instance of a condition of a bond, when the condition is founded on a recital.

Estoppel against estoppel doth put the matter at large.

Where the verity is apparent in the same record, or in an indenture of lease (*yy*), there the adverse party shall not be estopped to take advantage of the truth, for he cannot be estopped to allege the truth, when the truth appeareth of record, or in the indenture.

Where the record of the estoppel doth run to the disability or legitimation of the person, there all strangers shall take benefit of that record.

(*yy*) *Hermitage v. Tomkins*, Lord Raym. 729.

But if a record concerning the name of the person, quality, or addition, no stranger shall take advantage, because he shall not be bound by it (z).

There are other rules collected (a), but they are not inserted, since they relate exclusively to the learning of pleading and evidence.

The general rules, in reference to the power of alienation, are, as it has been shown, *qui non habet, ille non dat*; and *nemo potest plus juris in alium transferre quam ipse habet*.

The learning of estoppels and of warranties affords exceptions to these general rules. Though a stranger, or an heir apparent, or a presumptive heir, cannot grant as such (b), yet he may, by estoppel, bind any interest which he may afterwards acquire; and a man may, by accepting a lease under a stranger, by indenture, bind himself to be treated as his tenant, and to pay rent, while the term imported to be granted by the lease shall have continuance (c).

But different assurances will have different operations by way of estoppel;

1st, An *indenture* of lease, or a *fine sur concessit*, for years, will be an estoppel only during the term. It first operates by way of estoppel, and finally, when the grantor obtains

(z) 1 Inst. 352 b.

(a) 1 Inst. 352 a b.

(b) *Wivell's case*, Hob. 45. (c) *Bro. Abr. Estoppel*, pl. 221.

an ownership, it attaches on the seisin, and creates an interest, or produces the relation of landlord and tenant; and there is a term commencing by estoppel, but for all purposes, it becomes an estate or interest. It binds the estate of the lessor, &c. and therefore continues in force against the lessor, his heirs, &c. It also binds the assignees of the lessor and of the lessee. On this subject *Bacon* has a very correct and comprehensive statement of the law (*d*).

As to *feoffments*;

A feoffment by a person who is not the owner passes of necessity a fee by wrong or disseisin.

It binds the feoffor for his life by estoppel; so that he never can claim the right, though it should descend to him, in opposition to his own feoffment. He cannot purchase the fee, since his feoffment is a disseisin. But the feoffment is an estoppel only to him *personally*; it will not bind his heirs by its proper operation; on the contrary, as Lord *Coke* observes (*e*), "There is a diversity between a warranty and a feoffment; for if there be a grandfather, father, and son, and the father disseiseth the grandfather, and make a feoffment in fee, the grandfather dieth; the father against his own feoffment shall not enter; but if he die, his son shall enter. And

(*d*) *Gwill. Bac. Leases, O.*

(*e*) 1 Inst. 265

so note a diversity between a re-lease, a feoffment, and a warranty. A re-lease in that case is void; a feoffment is good against the feoffor, but not against his heir; a warranty is good both against himself and his heirs.

And if a man by his last will deviseth that his executors shall sell his land, and dieth, if the executors *re-lease* all their right and title in the land to the heir, this is void; for that they have neither right nor title to the land, but only a bare authority, which is not within *Littleton's* case of a re-lease of right; and so it is, if *cestui que use* had devised that his feoffees should have sold the land, albeit they had made a *feoffment* over, yet might they sell the use, for their authority in that case is not given away by the livery (*f*).

By a warranty annexed to an estate which passes by a feoffment, the heir, as far as he claims as heir, may be barred by force of the warranty as a rebutter, though not bound by the feoffment (*g*).

This bar of the heir is to avoid circuituity of action (*h*).

As to fines :

In *Edwards v. Rogers* (*i*), it was agreed that a fine by a stranger, or heir apparent, who

(*f*) 1 Inst. 265 b.

(*g*) *Edwards v. Rogers*, Sir W. Jones 456; 1 Inst. 265 a.

(*h*) 1 Inst. 265 a.

(*i*) Sir W. Jones 456.

afterwards by purchase or by descent became owner, would bind him and his heirs.

The language of *Jones* was, that “a fine may be by way of conclusion and estoppel, although neither the conosor or conusee had any thing in the land; for estoppel was devised and allowed in the law in support of truth; and to restrain a man to say a thing if it be false; and he should be concluded to say contrary to that which he had before affirmed.”

Again; a man levies a fine of lands in which he had nothing, and afterwards he purchases the lands from him who was the owner of them; this fine is by estoppel, and the conusee shall have the land against the conosor who purchases the land afterwards.

And this point was conceded by *Berkeley*.

And *Jones* added, that these estoppels by matter in deed [indentures of lease,] and by record, by fine or recovery, bind not only the party to the estoppel, but also all privies who claim under him; and this appears before the statute of 4 Hen. VII. by the ancient statute of fines, that parties and privies, and their heirs, shall be concluded to avoid the fine, by saying, that *partes ad finem nihil habuerunt*, or by averment of continuance of possession, and this was by the ancient law of the land.

And *Brampton*, (C. J.) agreed, that if a man levy a fine in which he has nothing, and afterwards purchase the land, or comes to it by descent, he shall be bound; and therefore, as

he said, if *Andrew* [the person who levied the fine] had survived his cousin, [the person last seised] *Andrew* and his heirs had been bound by the fine, and the conclusion would have extended not only to *Andrew* and his heirs, but to all others who came in the *post* to the land, according to the opinion previously given by *Jones*.

In *Goodtitle v. Morse* (*k*), Lord *Kenyon* observed, a fine differs from the case of a surrender [of copyhold lands], for that [the fine] will be good against the heir by estoppel, although it passes no estate at all.

So in *Wright v. Wright* (*l*), Lord *Hardwicke* stated the law to be, that notwithstanding the expectancy of an heir at law in the life of his ancestor, is less than a possibility, it is such as he may bind himself. In law, the heir may levy a fine of lands in the life of the ancestor, which will bind by estoppel after descent to him; so there is a method of conveying, that is, preventing a claim against it. And Lord *Coke*, in his Reading on Fines [21,] has these passages :

“ If there be father and son, and the father levies a fine of the manor of *D*, and afterwards purchases the manor, and the conusee enters; and after the father dies, now (as it seems to me) the son shall be barred. But (as it seems to me,) it is good to see the manner and form of pleading such case.

"If, in the same case, the son brings any action ancestrei, and as heir, and the fine be pleaded in bar, the son cannot say that the parties to the fine had nothing ; but if the son enter, and be vested, and brings assize, and the tenant pleads that the father of the plaintiff was seised in fee, and so seised, levied a fine, &c. ; the son may say, that the parties to the fine had nothing, but such a one whose estate he hath. By this way the plaint shall be tried ; and therefore the sure way for the tenant in such case to plead, is, to show all the special matter, how his father levied the fine, and after purchased the land ; for be the fine *executory* or *executed*, the fine shall bar his heir, as it seems to me."

In short, all the books agree, that a person who claims as heir to the conusor in a fine, cannot, *as heir*, avoid a fine by a plea of *partes nihil*, &c.

But to bind the heir, he must claim in the character, and in right, of heir of the person by whom the fine was levied (*m*).

And, therefore, if the person who is heir claims as heir to the mother, while the fine was levied by the father ; or if he claims as a *purchaser*, and not as heir ; or if he claims by descent from another ancestor, though he must name the person by whom the fine was levied

(*m*) Sir W. Jones, 460.

by way of *pedigree*, and not of title (*n*) ; in all these and the like instances the fine will not be a bar to the claimant.

A mere grant as such (*o*), or re-release (*p*), or a surrender of copyhold lands (*q*), will not operate by way of estoppel.

And estoppels are not binding in equity by way of estoppel.

Equity, however, will consider a lease, or alienation by a person before he was owner, as binding on him when he becomes owner (*r*).

But the equity was, in *Tanner v. Morse* (*s*), treated as *personal* against the heir, and not as binding *on his estate* ; so as to give a right against the succeeding heir : but the point was not decided.

Equity, however, carries its practice farther than law carries its rule.

At law, no lease, or other assurance, which operates in the first instance as and by way of *conveyance* (*t*), can be used by way of estoppel to bind any estate subsequently acquired, though the lease or conveyance does not confer the degree of interest it imports.

In these instances the rule of law is *cessante*

(*n*) *Edwards v. Rogers*, Sir W. Jones, 460.

(*o*) *Wivell's case*, Hob. 45.

(*p*) Litt. § 446, 1 Inst. 265.

(*q*) *Goodtitle v. Morse*; 3 Term Rep. 365.

(*r*) *Wright v. Wright*, 1 Ves. 409; *Beckley v. Newland*, 2 P. Wms. 191.

(*s*) 1 Anstr. 11.

(*t*) 1 Inst. 47.

statu, &c. except, indeed, a tortious alienation by feoffment, fine, or recovery, be made by a tenant at will, for years, or for life, or a discontinuance be made by tenant in tail.

But in equity, if a man who has a term for ten years, make a lease for twenty years; or a person who has an estate for life, or in tail, make a conveyance in fee, and afterwards acquires the fee; he will, if the transaction be founded on a valuable consideration, be bound by way of further assurance to give effect and confirmation to the original lease or alienation.

Against those who may treat the learning of estoppels as contrary to justice, Lord *Kenyon's* observation may be opposed: he observed, "where, indeed, an heir apparent, having only the hope of succession, conveys, during the life of his ancestor, an estate, which afterwards descends upon him, although it passes at the time, he is estopped to say that he had no interest at the time of the grant. There an estoppel is founded on law, conscience, and justice (*u*)."

Under Tenants of Legal Estates.

IN the deduction of titles, few subjects are of more importance than the difference between the legal and the equitable ownership.

And it will be proper to enter on the consideration of titles under estates which are legal, and estates which are equitable, and under powers and authorities ; and to advert to the relative situation of trustees, and *cestui que* trusts, and of the donees of powers and of authorities, and the objects of such powers and authorities.

As one person may be the mere legal owner, while another person is the equitable owner, therefore, in analysing the abstract, the legal title and the equitable title should be considered distinctly ; especially when the deduction to the different interests is carried on by distinct deeds, wills, &c. through a long series of years ; or when from any other cause, the state of the title, as referrible to the legal and equitable ownership, is rendered complex.

The legal estate confers the title to the legal ownership.

Ejectments, real actions, &c. must be brought on the foundation of the title of the legal owner

And no one can protect himself as a purchaser for a valuable consideration, and without notice, unless he obtain the shield afforded by the legal estate.

Sometimes the legal owner is by reason of his estate also the beneficial owner. In that case the title of the legal owner may be considered as complete.

But in many cases the legal owner is merely a trustee for other persons.

Sometimes he is merely and simply a trustee; as in the instance of a gift to and to the use of *A* in fee, in trust for *B* in fee; or in trust for *B* for life, remainder to *C* in fee.

In this instance the title must be considered, 1st, As it respects the legal estate.

2dly, As it respects the equitable estate.

So also after a mortgage in fee, by the owner of the legal estate, the mortgagee has the legal estate, and the mortgagor has the equitable estate; and the title must be considered,

1st, As it regards the legal estate; and,

2dly, As it concerns the equitable ownership.

And sometimes, as after the death of the mortgagee, it must be considered under a third head, viz; as it respects the right to the money secured on the mortgage; for the money will belong to the executor or personal representative of the mortgagee, although the legal estate will descend to his heir at law, or pass to some other person by a devise in the will of the mortgagee. And it is frequently of importance, and difficult, to decide whether the language of the will of a mortgagee or trustee has transferred the legal estate.

Sometimes also the trustees not only have the legal estate, but also have the control and power of disposition over the equitable owner-

ship, and the means of conferring a good title to the property, either absolutely, or under certain modifications or restrictions ; as with the consent of certain persons, and the like, or by the exercise of powers of sale, &c. &c.

This happens more particularly when there is an express trust, to sell and give discharges for the purchase money ; or when, from the nature of the trusts, the money is to be placed under the control of the trustees, and to be applied by them ; indeed, in all cases, in which the purchaser is, either expressly, or by the nature of the trust, exempted from any obligation to see to the application of his purchase-money.

These observations lead to the intricate and abstruse subject of the doctrine of courts of equity, respecting the application of purchase-money.

In these courts, the *cestui que* trust, and even the person who is to receive a specific sum or annuity, is considered as substantially the owner, to the extent of his interest ; and unless the necessity for seeing the purchase-money applied, be dispensed with, the purchase-money must be paid to that person, as far as he is entitled ; or must be paid or applied under his direction, or with his consent.

As the obligation of applying the money in payment to the *cestui qui* trust is attended with great inconvenience, the practice has become

very general to introduce in trust deeds, wills, and settlements, a clause dispensing with all obligation on the part of mortgagees, purchasers, &c. to do more than pay the money to the trustees, or under their direction; and titles are simplified in a very useful and important degree, by this provision; and deeds, deducing the title under the trust deed, are shortened; since there will not exist, except in particular cases, being those cases in which the equitable title is to be deduced under the trust, any reason for inserting the trusts in the recitals. The investigation of the title is facilitated since the material provisions to be considered, are brought into a narrower compass.

There are other cases, also, in which, by the rules of a court of equity, and from the nature of the trusts, the purchaser is exempted from all obligation to see to the payment of the purchase money.

In the first place, when there is a trust for the payment of *debts* generally, and also of legacies, the purchaser is discharged from seeing to the payment of the debts, because, from the want of specification of the debts, it is impossible for him to know to whom the money should be paid; and as he is discharged from the obligation to see to the payment of debts, which are the primary charge, he is, as a consequence, discharged from all obligation

to see to the payment of the legacies, which are a secondary charge (*x*).

But there are exceptions to this rule:

1st, When the debts, though general in the first place, become *specific* by proceedings in equity; or 2dly, by some other means, they are ascertained (*y*); or, 3dly, it is stated, that the debts are paid, so that the legacies become the only charge, &c. &c.

When the trusts require that the purchase-money should be paid to the trustees, and should be laid out, and *invested by them*, in their names, &c.; this direction is in practice treated as equivalent to an express clause, dispensing with the necessity of seeing to the application of the purchase-money; more particularly when the trust is for infants and other persons incapable of joining in the conveyance.

But it is usual to see to the application of the money, even in cases of this nature, so far as to place the money in the joint names of the trustees, and in that fund, if any, in which the author of the trust has directed it to be applied, and to have a deed evidencing such investment, and containing a declaration of trust executed by the trustees.

(*x*) *Smith v. Guyon*, 1 Bro. C. C. 186; *Humble v. Bill*, 1 Eq. Ca. Abr. 358, pl. 4; *Jebb v. Abbot*, and *Benyon v. Collins*; *Butl. n.* (1) to Co. Litt. 290 b, § 12; 6 Ves. jun. 654, n.

(*y*) *Lloyd v. Baldwin*, 1 Ves. 173.

On the application of purchase-money there are many nice distinctions. All the useful learning on the subject will be found in Mr. Butler's note on Coke's Littleton. Most of the material cases are collected by Mr. Powell in his last edition of his Treatise on Mortgages. Mr. Sugden, in his work on Vendors and Purchasers, has arranged the cases into their proper classes, and given the points of distinction in a clear and perspicuous manner.

As a mere equitable title is not considered to be strictly marketable, and as many disadvantages arise, and a considerable risk is run, in consequence of the want of the legal title, care should be taken that there is a regular deduction of the legal title, and all defects in the same should be supplied.

So it is of great importance to have the legal title so circumstanced, that a purchaser may be able to rely on his possession, and to defend himself even from an ejection from any claimant; and, as far as circumstances will admit, there should be such evidence of the legal title, as will afford the prospect of holding the property free from eviction, under a claim of right, or any other adverse proceeding.

It is still more important that a person who purchases a reversionary interest should have such a title as would enable him to maintain an ejection, or some other available form of action, to recover the possession, at the time when his right to the possession shall arrive.

Mortgagees, or persons who advance money on the security of lands, are in a particular and special manner interested in having the legal title; since, for want of the legal title, they are not only exposed to the risk of having their security defeated by dormant encumbrances, existing prior to their mortgages; but a preference may be obtained as against their securities, by a subsequent encumbrancer, who shall acquire the legal title for a valuable consideration, without the notice of their prior encumbrances; since, for want of actual possession in the mortgagees, there will not be constructive notice from possession, of the existence of the mortgages.

This subject will be more fully considered in directing the attention of the reader to the general view, of the state of the title, and, in particular, of the value and importance of attendant terms for years.

All the trustees ought to join in completing the legal title, and in giving discharges for the purchase-money, if the purchase-money is to be received by them. And if a trustee once accept the trust he cannot afterwards decline it by his own act, and under his own authority, unless there be a power or provision for that purpose (z).

But another trustee may be substituted in his place, under a power to change trustees

if there be any such power in the deed or will, or for want of such a power under the decree of a court of equity. But even courts of equity cannot transfer to one person authorities, such as a mere authority to sell, which were given to another person.

In cases of that nature, an act of parliament will be necessary to communicate the powers to a new trustee.

The trustees of a will who have never accepted the trust, may decline to act.

The statute of 21 Hen. VIII. c. 4, has specially provided for this case as to trustees under wills. For this purpose they should execute a deed of disclaimer. The effect of such disclaimer will be to vest the estate in the remaining trustees, if any; and if no acting trustee remain, the will, will, at law, be inoperative. Equity, however, will supply the trust; for equity never wants a trustee when the lands are charged with a trust which fastens on the land, except that the king, or the lord, by escheat, is not bound by a trust.

The trustee who means to disclaim should cautiously refrain from making a conveyance to his co-trustees. A conveyance pre-supposes an acceptance of the trust; for unless the grantor has accepted the estate given to him as trustee, he has no estate to convey (*a*).

(*a*) *Crewe v. Dicken*, 4 Ves. 97.

The case of *Crewe v. Dicken*, however, when analyzed, seems to have adhered to form and technicality, to the sacrifice of substance and principle.

These observations are intentionally confined to disclaimer by trustees under a will. In copyhold titles, it is frequently of great convenience, that when several persons are named as joint-tenants, and a fine on admission would be increased on account of the number of tenants, all of them except one, should, when this may be done without prejudicing the execution of the trusts, release to that one, or disclaim in his favour, so as to make him *sole tenant*.

It has generally been supposed that grantees under a deed may disclaim. On that point there seems to be a distinction, which deserves attention (*b*).

In the first place, if a grant be made by one man to another, the estate will, in intentment of law, vest immediately in the grantee; but by refusal or disagreement the grant will be void *ab initio*. This point was fully discussed, and received a determination in the case of *Thomson v. Leach (b b)*.

It has also been supposed, that when a grant is to two or more persons as joint-tenants, the disagreement of some or one of them will vest the estate in the others.

(*b*) Litt. § 685.

(*b b*) 2 Ventris, 193; 3 Mod. 296.

The books, however, and in particular that great master of the law, *Littleton*, in his *Tenures*, treat the acceptance of the estate by one of several joint-tenants, as necessarily vesting the estate in all of them. Thus, the refusal *in pais* viz. by mere disagreement or declaration, with or without deed, by one of them, would not vest a *sole* seisin to the others. To give such sole and exclusive seisin, there must be an *estoppel*, by disclaimer on record.

Perhaps on the death of all of the joint-tenants except the one who disagreed, he would be at liberty by his disagreement or disclaimer, after he became the survivor, to prevent the estate from vesting in him solely; but the present impression is, that he could not divest the estate by any other means than a disclaimer on record.

It is almost needless to observe, that when a grant is to several persons as tenants in common, each of them is a distinct tenant of his particular share; and a disagreement or disclaimer by that person, even in *pais*, would have the same effect, as to his share, as if the grant had been to him as sole tenant.

The learning on this subject may be collected from the cases of *Hawkins v. Kemp* (*c*) ; *Crewe v. Dicken* (*d*) ; and *Littleton's Tenures*, chap. Remitter (*e*) ; *Shep. Touch. chap. Deeds*,

(*c*) Cro. Eliz. 80 ; 3 East 410.

(*d*) 4 Ves. jun. 97.

(*e*) § 685.

in that part in which he treats of agreement, as essential to the validity of a deed ; also in *Viner's Abridgment*, title Disclaimer, &c. ; and *Cruise's Digest* (*f*).

Whoever purchases from a trustee with notice of the trust, or without a valuable consideration, will be considered as a trustee in the place of the person from whom he receives the conveyance, as far as the trustee was incompetent to part with the beneficial ownership (*g*).

Hence it particularly behoves a purchaser from a trustee, to take care that the trustee has a right to confer on him a good equitable title of his own authority ; otherwise he should require the concurrence of the persons who are competent to give such title.

To protect a purchaser who buys from a trustee, he must be a purchaser for a valuable consideration, and without notice. He must obtain his conveyance, and pay his money prior to notice ; for if he have notice before the conveyance shall be executed, or after the conveyance shall be executed, and before he shall have paid *all* his purchase-money, (and mere security is not payment,) he will not be able to sustain or take advantage of the plea, that he is a purchaser for a valuable consideration, and without notice (*h*).

(*f*) Title Devise. (*g*) *Boney v. Smith*, 1 Vern. 60.

(*h*) *Miford's Pleadings*, p. 216.

It is a general rule, that a title merely equitable, is not considered as marketable; hence the importance of taking care to have a control over the legal estate. A person who buys an estate merely equitable, always runs the risk of mortgages and other encumbrances created by the *cestui que* trust, and also of escheat, &c.; and he obtains a title not eligible to a future purchaser or mortgagee.

On the other hand, a purchaser who buys with a view to beneficial enjoyment, will be defeated of his purpose, if the person from whom he purchases, has merely a legal estate, without any right to confer a title to the beneficial ownership; and hence, the necessity of requiring the concurrence of the *cestui que* trust, in those cases in which the trustee is a mere trustee, without any power under which he can complete the equitable title.

This observation leads to the consideration already suggested, that there are two sorts of trustees; first, such as are *mere trustees*; and secondly, such as can confer a title in equity, as well as at law.

Under a conveyance to and to the use of *A* and his heirs, in trust for *B* and his heirs; *A* has the legal estate, and *B* the equitable ownership. *A* may transfer the legal estate in any manner he pleases, subject to the legal title of the trustee, till a conveyance shall have been obtained from him.

In this case *A* is a mere trustee; and he

alone cannot, at least in favour of a person who has notice of the trust, confer any right to the equitable estate.

The second sort of trustees are those who are intrusted with the legal estate, or a power over it ; and, either generally, or with some restrictions, a trust or power to sell, to mortgage, or do some other act, is confided to them.

Trustees of this sort, pursuing the directions if there be any, as consent, and the like, may confer a right to the beneficial ownership, as far as that right is at their disposal, by the nature of the trust reposed in them.

In general the trusts are expressed in the deed or will under which the legal title of the trustee arises. In these circumstances, no person who purchases from him, can protect himself by alleging that he is a purchaser for a valuable consideration without notice.

The declaration of trust in the deed by which the trustee derives his title, is implied notice of the trust ; since the trustee cannot give evidence of his right to the legal estate without disclosing the trust to which that estate is subject. And if one deed be, by any means, connected with another ; as a lease made in consideration of the surrender of a former lease ; this lease will be implied notice of the title or tenant-right under that lease (*i*).

But when the legal estate is conveyed by

(*i*) *Coppin v. Fernyhough*, 2 Bro. C. C. 291.

one deed, and the trust is declared by a distinct deed; or if by any other means, the evidence of the legal title be altogether independent of the trust, then a person who purchases of a trustee, without actual or constructive notice of the trust, will be entitled to hold discharged from the trust.

A sale to a purchaser for a valuable consideration without notice, will discharge the lands from the trust; so that the lands will not be liable to the trust in the hands of a subsequent purchaser; although such subsequent purchaser may have notice of the trust, since, were the rule different, the innocent owner could not have the full benefit of his property.

But a re-purchase by the trustee himself would revive the trust (*k*) as against him and his heirs; though the lands were discharged while they belonged to the former purchaser.

Among various other purposes for which trustees are constituted, they are sometimes appointed for supporting contingent remainders; and if they concur in destroying the contingent remainders, instead of performing the duty of preserving them, they will be guilty of a breach of trust; and whoever purchases with notice of the uses, which these trustees were bound to protect, will become a trustee for the objects of these uses.

There are some, though a very few, cases

(*k*) *Bovey v. Smith*, 1 Vern. 60.

however (*l*), in which trustees will be decreed to join in a new settlement, though they will, by that means, destroy some of the uses they were appointed to preserve; and there are some cases in which it is the better opinion, that they may, in their discretion, assist the first tenant in tail in suffering a common recovery, and barring the remote estates, even without the direction of a court of equity.

In the late case of *Moody v. Walter* (*m*), all the authorities were reviewed by the present chancellor (Lord *Eldon*), but no practical conclusion can be drawn from the judgment.

The particular case was decided on the ground, that there were *special circumstances* which sustained the title; although the recovery could not have been suffered without the concurrence of the trustee for supporting contingent remainders.

But in a subsequent case his lordship has, it is apprehended, gone the whole length, as a general proposition, that it is no breach of duty in a trustee for supporting contingent remainders, to join with tenant in tail in suffering a common recovery.

Whenever the freehold is by a settlement placed in trustees, it will be proper to give them, by a special provision, an authority or discretion to join in assisting the tenant in tail in suffering a common recovery.

(*l*) See 1 *Fearne*, p. 331.

(*m*) 16 Ves. 283.

At one period, it was understood that a trustee could not purchase the estate of which he was a trustee. The rule is to be understood with the qualification, that it is at the option of the *cestui que* trust, either to insist on the sale, or to have the lands re-sold (*n*), or to have the benefit of any sale which has been made by the trustee. On this subject, the 14th chap. of Mr. Sugden's Law of Vendor and Purchaser will afford the requisite information.

Of the Cestui que Trust.

THE *cestui que* trust is the equitable or beneficial owner. That ownership may be settled and modified, and estates-tail therein may be barred, in the same manner, and under the same circumstances, as if the owner of the equitable estate were the owner of the legal estate. This important difference is, however, to be kept in view; the owner of an equitable estate may convey by an instrument which would not be effectual at law for a legal estate.

For instance, there is no case in which a feoffment, or lease and re-lease, is necessary to convey his estate; and a bargain and sale will be good, though it be not enrolled; and before the statute of 4 and 5 Anne, a grant of an equitable estate would have been good without attornment. For all these ceremonies of livery, attornment, &c. &c. are peculiar to legal estates,

and are founded on rules of tenure, in no degree referrible to equitable estates.

And if a trustee convey under the direction of the *cestui que* trust, although there be not any words of grant, on the part of the *cestui que* trust, yet the equitable, as well as the legal, ownership will pass. Such was the opinion of gentlemen of distinguished eminence ; and the equitable owner may convey his ownership without the concurrence of his trustee.

In regard to recoveries by equitable owners, all that is material will be found in the chap. on Common Recoveries, in the 1st Vol. of the *Practice of Conveyancing*.

Lord Alvanley observed, "equitable estates are to be held perfectly distinct and separate from the legal estate. They are to be enjoyed in the same condition ; entitled to all the same benefits of ownership ; disposable, devisable, and barable, exactly as if they were estates executed in the party ; and the persons having them may, without the intervention of the trustees, or the possibility of their preventing them from exercising their ownership, act as if no trustees existed, and this court will give validity to their acts. And when I am told that legal and equitable estates cannot subsist in the same person, it must be understood always with this restriction, that it is the same estate in equity and at law (o)."

(o) *Philips v. Brydges*, 3 Ves. 127.

There is one qualification to this rule. A married woman having a separate estate is considered as a *feme sole*, so far, as by the nature of the trust, she is constituted a *feme sole* (*p*).

And another rule may be added ; whenever the equitable estate and the legal estate, for the like corresponding interests, vest in the same person, the equitable interest will merge in the legal estate ; and the heir to the purchaser of the legal estate, and not the heir to the purchaser of the equitable estate, will be entitled (*q*).

For as between heirs or representatives, there is not any equity. Each class must take the property as it is found, unless there be a contract to the contrary ; for under contracts real estate may be considered as personalty ; and personalty may be treated as realty, as between representatives.

With this exception, another general rule is, a man cannot be a trustee for himself, nor in general for his representatives.

In investigating titles to the legal, as distinguished from the equitable, ownership, conveyances are to be divided into two classes,

1st, Conveyances which operate by passing a common law seisin, to supply the use; and

2dly, Conveyances which owe their effect entirely to the statute of uses, and under which

(*p*) *Burnaby v. Griffin*, 3 Ves. jun. 266.

(*q*) *Goodright v. Wells*, Dougl. 771, 2d edition; *Selby v. Alston*, 3 Ves. jun. 339.

the use arises, from the seisin of the owner himself.

Of the former description are,

Feoffments;

Fines;

Recoveries;

Gifts;

Grants;

Releases, and confirmations in enlargement of a previous estate; and consequently, the ordinary conveyances by lease and re-lease;

Also wills.

Of the latter description are,

1st, Bargains and sales of use under the statute of uses, and of enrolment.

2dly, Covenants to stand seised to uses.

When a conveyance is to a man and his heirs, the legal seisin passes to him; and if the use be declared in his favour, or if from the nature of the transaction, as by payment of a consideration, or for any other cause (*r*), the estate is to remain in him, he will continue seised by the rules of the common law. So if the use be declared in favour of him and his heirs, the seisin will remain in him by the rules of the common law; and this use, declared in his favour, will exclude the right of the grantor to have the lands by resulting use; or to pass the legal estate through the medium of the statute to any other person, by declaring any further use of the seisin of *A*.

(*r*) *Altham v. Anglesey*, Gilb. Eq. Cas. 16.

But the use may be declared partly in favour of *A*, and partly in favour of some other person; as to the use of *A* for his life, remainder to the use of *B* in fee, or to the use of *B* for life, remainder to the use of *A* in fee; or the use may be varied in any other manner; or the use may be declared in part, so as to leave the fee as a reversion in the grantee, under the rules of the common law. And powers may be introduced into such conveyances; or the use may be declared wholly in favour of strangers; so that *A* may be merely a feoffee, or re-leasee, or devisee to uses. In all these instances the use will be executed by the statute.

In short, whenever a common-law seisin is conveyed to one person, either for life, in tail (*s*), or in fee, to the use, or, which is the same in effect, in trust for another person, the use will be executed by the statute, unless it be open to the objection of being an use on an use; or, in other words, and more correctly, unless it be repugnant to some use previously declared.

Sometimes, for want of an express declaration, the use will result to the former owner.

That a use may result, there must be a *vacancy* of ownership under the declaration of uses, commensurate with the period, or corresponding with the estate which is to result; for instance, if a conveyance be made by *A*

(*s*) *Thurman v. Cooper*, Cro. Jac. 476.

to *B* in fee, to the use of the heirs of the body of *A*, the use may result to *A* for his life, unless the freehold be limited to some other person for his life; or unless there be an express estate for years, which excludes the presumption, since an express estate will never be defeated by implication.

So if several uses, by way of particular estate, be declared of the seisin, but no use is declared of the ultimate fee, the fee will result to the former owner, unless there be an apparent intention to keep the fee in the grantee; and whatever use results to the grantor will be executed by the statute.

So if a feoffment be made, fine levied, or recovery suffered, and no use declared of the assurance, and there is not any circumstance; as a consideration, a special trust, or the like, to keep the estate in the demandant in the recovery, the conusee in the fine, or the feoffee, &c. the use will result to the former owner, according to his former ownership.

And if several persons join in such recovery, &c. the use will result to them, according to their respective shares, estates, and interests. For instance, if joint-tenants are the conveying parties, the use will result to them as joint-tenants. If tenants in common are the grantors, the use will result to them as tenants in common, and for the like shares as they formerly had; and each will, in point of title, have his identical share; and if *A*, tenant for

life, and *B*, the remainder-man in fee, convey, the use will result to *A* for life, remainder to *B* in fee.

But if tenant in tail be the conveying party, then the use resulting to him, will be an use of the fee; either absolute or determinable, according to circumstances, and not an estate-tail (*t*).

He will have a fee commensurate to that estate, which passes by his conveyance to the demandant in the recovery, conusee in the fine, feoffee, &c. However, when no express use is declared, the conusee in a fine, a feoffee, &c. may show that he is entitled to retain the estate for his own benefit.

In the technical language of the books, he may rebut the implication of an use, and aver that the recovery was suffered, the fine was levied, or the feoffment made to his own use (*u*).

This is a reason for uniformly declaring the uses of fines, &c. to prevent any doubt respecting the state of the title to the legal estate under the uses.

There are also many cases in which the legal estate may remain in the demandant in a recovery, a conusee in a fine, a feoffee, the trustee or, devisee of a will, &c. &c. Thus, if a tenant

(*t*) *Moxon v. Moxon*, and *Hodges v. Fowler*, in the Exchequer, 1777, 1 vol. of Practice of Conveyancing, 195.

(*u*) *Altham v. Anglesea*, Gilb. Equity Cases, 16; *Roe v. Popham*, Doug. 24, and *Thurstout v. Peak*, 1 Str. 14.

in tail levy a fine to *B*, without declaring any use of the fine, and, at the distance of several years, a common recovery be suffered, in which *B* shall be named tenant to the writ of entry, this circumstance will lead to the conclusion that the fine was levied to *B* for the purpose that he should be tenant to the writ of entry; and, as a consequence, since he could not be tenant without retaining the seisin, the seisin will remain in him (*x*).

So if a consideration be paid by the conusee of a fine, a feoffee or re-leasee, &c.; and no use be declared in favour of any other person, the use will remain in him, notwithstanding no use shall be expressly declared in his favour. But the use will not remain with him in opposition to an express use, declared in favour of some other person, if such use be declared in the deed of feoffment, grant, &c. to him, or be declared with his concurrence. And even a nominal consideration will not keep the use in the re-leasee, when an use is declared for life in favour of some other person, and no intention to give any beneficial interest to the grantee, is apparent (*y*).

So if a conveyance be made to *A*, to the intent that he shall be tenant to the writ of entry, this declared intent will prevent the resulting of the use, and keep the seisin in him.

(*x*) *Altham v. Anglesea*, Equity Cases, 6.

(*y*) *Shortridge v. Lamplugh*, 2 Salk. 678.

So if a conveyance or a devise be made to *A* and his heirs, upon trust, to sell, to convey, to pay the rents, &c. ; these and the like declarations of intent render it necessary that the legal estate should remain in the trustees ; and, as a consequence, rebut the presumption of a resulting use ; and in many cases they have the effect of showing, that even uses expressly declared are not to confer any other title than to the equitable ownership.

So if a conveyance or devise be to trustees upon trust, for the separate use of a married woman, the legal estate will remain in the trustees, for the purpose of enabling them to protect the interest of this woman (z).

In some cases, as in *Jones v. Lord Say and Sele* (*a*), (which, however, is a case *sui generis*, and an anomaly,) the estate may remain in the trustees only for a particular period, as for life, and a subsequent use may be executed by the statute. This case depends on the peculiar language of the will, and the circumstance that the gift to the heirs of the body, was introduced by a break in the sentence, and by an independent clause, containing evidence of an intention, that after the death, &c. the trustees should stand seised to uses.

In a recent case (*b*), the court of king's

(z) *Silvester v. Wilson*, 2 Term Rep. 444.

(a) 8 Vin. Ab. 262, 10 Mod. 43.

(b) *Doe v. Simpson*, 5 East 162.

bench favoured the construction, under which the trustees took a particular estate, with a chattel interest superadded, as the means of giving effect to the presumed intention of the testator, without keeping the legal fee from the other objects of his will. This is the first decision, in which such a latitude of arrangement has been exercised.

Generally speaking, a limitation to the trustees, and their heirs, will give the fee to them. Thus, a devise to *A* for life, with remainder to trustees, and their heirs, without saying for the life of *A*, and after his death to his first and other sons in tail, will place the legal fee in the trustees ; and the subsequent limitations will confer mere equitable estates ; but if, from the context of the will or deed, there would be any repugnancy in considering the legal fee to be in the trustees, then, on the context of the instrument, the estate of the trustees would be confined to the period of the life of that person from whose death the limitation over is to have effect. Thus, if, in the instance last adduced, there had been subsequent limitations to *C* for life, with remainder to the same trustees, and their heirs, without saying for the life of *C*; or to the same trustees for years, with remainder over after the death of *C*; or, if among the subsequent limitations a term for years had been given to the trustees, this circumstance would have afforded an implication that the trustees should take merely an estate for life under the first clause.

This construction arises from the consideration that the ulterior limitation to the trustees would, in a legal point of view, be nugatory, unless from the context, and with a determination to give effect to every part of the deed, the court should confine the first limitations in favour of the trustees, to the period of a life. The material cases on this point are *Shapland v. Smith* (*c*) ; *Venables v. Morris* (*d*) ; *Compere v. Hicks* (*e*) ; and *Curtis v. Price* (*f*).

It is also to be observed, that no estate arising from a declaration of use, can be more extensive than the estate, or seisin, from which this use was supplied (*g*). For this reason, if *A*, being tenant for his life, convey to *B* and his heirs by lease and re-lease to the use of *C* and his heirs, *C* would take a seisin merely for the life of *A* ; and the estate of *C* would be commensurate with that period. But in some cases the declaration of use may be construed to be part of the limitation, and convey a larger estate than would otherwise have passed. In this point of view, it must be considered as part of the limitation of the legal estate, and conferring a right by the rules of the common law, independent of the statute of uses ; and not as an use divided from the legal estate.

(*c*) 1 Brown, Ch. Cas. p. 74.

(*d*) 7 Term Rep. 342.

(*e*) 7 Term Rep. 433.

(*f*) 12 Ves. jun. 89.

(*g*) *Jenkins v. Young*, Cro. Car.; and *Essay of Estates*, introductory chap.

For example: *A*, seised in fee, conveys to *B*, to hold to *B*, to the use of *B* and his heirs, for the lives of *A*, *B* and *C*. This declaration of use will be considered as part of the limitation of the legal estate, and will convey the lands during the several lives of *A*, *B* and *C*; while, if the conveyance had stopped at the *habendum* to *B*, *B* would have been merely tenant for his own life.

This rule of exposition is applicable only when the grant and declaration of use are in favour of the same person. For when the grant is to one person, and the use is in favour of another person, the use must necessarily arise from the seisin, and cannot confer a larger interest than the seisin or estate out of which the use is to be supplied.

But a conveyance to *A*, and his heirs, in trust for *B* and his heirs, *totidem verbis*, or to that effect, or in trust for *A* for life, or to permit him to receive the rents and profits, gives an use which will be executed by the statute. For these trusts are in effect uses, and the statute of uses takes notice of trusts as well as uses, and embraces, and converts into estate, all trusts which are, in substance and effect, uses.

But there are *some trusts which are not uses*; of this description are trusts to sell for the benefit of *B*; or of creditors; or to receive the rents, and pay them to *B*, and the like. For in these instances the use is in the trustees, subject

only to a trust directing the application of the rents.

In drawing the conclusion, that an use is executed by the statute, several circumstances are to be regarded :

1st, That the legal seisin is transferred to the feoffee, or other grantee :

2dly, That he is capable of being seised to an use :

3dly, That there is an estate of freehold or inheritance, to supply a seisin to uses :

4thly, That there is a subject of which an use may be declared :

5thly, That there is a person to take, and capable of taking, the use :

6thly, That an use is declared, and that it is warranted by the rules of law.

On all these points, *Chudleigh's* case, *Shelley's* case; Mr. *Butler's* note in *Coke's Littleton*, on Uses and Trusts, and his Practical Notes; *Cruise on Uses*; *Bacon on Uses*; *Saunders on Uses*; *Shep. Touch.* chap. Uses, and *Comyn's Digest*, title 'Uses,' together with the observations in the introductory chap. of the *Essay on Estates*, should be consulted.

No subject more materially concerns the conveyancer, or the state of titles, than the doctrine of uses; and a large portion of time should be devoted to attain the knowledge of this part of the law. The subject should be rendered perfectly familiar; for without a thorough knowledge of the law on this subject

no one can peruse an abstract of title with satisfaction, or advise on it, with credit to himself, or justice to his client.

Under a former division (*h*), various instances in which an act may be done under the doctrine of uses, or through the medium of a conveyance to uses, which could not be accomplished by the rules of the common law, have been stated.

In investigating titles to the equitable, as well as the legal, ownership, it often becomes a subject for minute and anxious consideration, to decide whether a person has the legal or only an equitable estate, under the language of a particular deed or other instrument; and this question most commonly arises on wills.

A few observations on this point may be useful :

1st, No one, except by committing a disseisin, can transfer the legal estate, unless it be vested in him, or unless he have a power or authority over the estate ; and he cannot have such power unless it be under a conveyance or devise to uses ; nor such authority, unless it be given to him by will or act of parliament.

Authorities were known to the common law; but powers, as distinguished from authorities, owe their introduction to the doctrine of uses. In short, these powers are a modification of the use.

Some powers are coupled with an interest; some are mere naked authorities. But even when they are naked authorities, they are more properly denominated powers than authorities.

To begin with authorities.

On Titles under Authorities..

AN authority to *A* to sell, given by will, will enable *A* to confer a title to the legal estate, and as the exercise of this authority passes a common-law seisin, an use may be declared of such seisin. Such use will be executed by the statute for transferring uses into possession (*i*).

Thus, if *A*, having an authority to sell or mortgage, bargain and sell to *B* and his heirs, to the use of *C* and his heirs, *B* will have the legal seisin by the rules of the common law, and this seisin will be drawn out of him by the operation of the statute of uses, and vested in *C* and his heirs. For this use, in favour of *C* is not open to the objection of being an use on an use, or an use in the second degree. It is an use declared of a common-law seisin.

The like observation is applicable to bargains and sales by commissioners of bankrupt, and under the land-tax acts, and other acts conferring authorities, &c. &c. But if such a bargain and sale be made to and to *the use of B* and

(*i*) 27 H. 8. c. 10.

his heirs, by one entire clause, or to *B* and his heirs, to the use of *B* and his heirs, by several clauses; with a further limitation to the use of *C* and his heirs; then the use declared in favour of *C* will be a mere trust or equitable estate, since the use declared in favour of *B*, renders any further declaration of use repugnant. An alternate or shifting use is not exposed to this objection.

Of Powers.

By the exercise of a power an use passes, and this use will be executed by the statute; and therefore if *A*, having a power to appoint to uses, appoints to *B* and his heirs, to the use of *C* and his heirs, *B* is the *cestui que* use; and this use will be executed into estate by the statute, and, as a consequence, the use declared in favour of *C* will confer a title merely equitable.

But appointments admit of shifting uses, and such shifting uses may becomes estates under the statute. Thus an appointment may be by *A*, to the use of *B*, and his heirs; and if *B* shall die under the age of twenty-one years, then to *C* and his heirs.

In the former case, the secondary use is merely equitable, not executed by the statute; because it is to arise from the seisin of *B*, and *B* is merely a *cestui que* use, so that the use to *C* is an use on an use.

But, in the latter case, the use in favour of *C* is limited by way of substitution for the use

to *B*, and is to arise from the seisin of the person to whom the original conveyance was made, and under which the power exists ; consequently it is free from the objection of being an use on an use, or an use in the second degree, to arise on the estate of the former *cestui que use*.

This comprehensive head of the law should be pursued in Mr. Sugden's Treatise on Powers.

Of Persons having Authority.

As authorities are mere powers, without any interest, they are construed strictly, while powers conferring an interest receive a liberal construction.

Powers are admissible only in wills and assurances which owe their effect to the statute of uses. Trusts by way of power are common to such assurances, and to conveyances in trust, and to acts of parliament. As authorities must be observed strictly ; they must be executed according to the language, or at least the true construction, of the terms of the authority. Naked authorities cannot, without a special power for the purpose, be released or extinguished by the person to whom they are given. They may, however, be released by the person in whose favour they are to be exercised ; for example : if *A* have an authority to make an appointment in favour of *B*, a release may be made by *B* of the right to take under the power. The release should be to the owner of the land,

and not to *A.* When an authority is given to two or more, jointly, all must concur in the exercise of the authority, except the case fall within the provisions of the stat. of Hen. VIII. or the power is expressly delegated to the survivors and survivor, &c.

By the statute of 21 Hen. VIII. c. 4, after reciting, that “ divers sundry persons, before this time, having other persons seised to their use of and in lands and other hereditaments to and for the declaration of their wills, have by their last wills and testaments willed and declared such their said lands, tenements, or other hereditaments to be sold by *their executors*, as well to and for the payment of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up and advancement of their children to marriage, as also for other charitable deeds, to be done and executed by their executors, for the health of their souls ; and notwithstanding such trust and confidence so by them put in their said executors, it hath oftentimes been seen, where such last wills and testaments of such lands, tenements, and other hereditaments have been declared, and in the same divers executors named and made, that after the decease of such testators, *some* of the executors, willing to accomplish the trust and confidence that they were put in by the said testator, have accepted and taken upon them the charge of the said testament, and have been ready to

fulfil and perform all things contained in the same, and the residue of the same executors, uncharitably, contrary to the trust that they were put in, have refused to intermeddle in anywise with the execution of the said will and testament, or with the sale of such lands so willed to be sold by the testator. And forasmuch as a bargain and sale of such lands, tenements, or other hereditaments so willed by any person to be sold, by his executors, after his decease, after the opinion of divers persons, can in no wise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named to and for the same, by reason whereof, as well the debts of such testators have rested unpaid, and unsatisfied, to the great danger and peril of the souls of such testators, and to the great hindrance, and many times, to the utter undoing of their creditors, as also the legacies and bequests made by the testator to his wife, children, and for other charitable deeds to be done for the wealth of the soul of the same testator that made the same testament, have been also unperformed, as well to the extreme misery of the wife and children of the said testator, and also to the let of performance of other charitable deeds for the wealth of the soul of the said testator, to the displeasure of Almighty God.: For remedy thereof, it is enacted, that where part of the executors named in any such testament of any such person so making or declaring any such

will, of any lands, tenements, or other hereditaments to be sold by his executors, after the death of any such testator, do refuse to take upon him or them the administration and charge of the same testament and last will, wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the care and charge of the same testament and last will, then all bargains and sales of such lands, tenements, or other hereditaments so willed to be sold by the executors of any such testator, as well heretofore made as hereafter to be made by him or them only of the said executors that so doth accept or that heretofore hath accepted and taken upon him or them any such care or charge of administration of any such will or testament, shall be as good and as effectual in the law as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of the bargain and sale of such lands, tenements or hereditaments so willed to be sold by the executors of any such testator, which heretofore hath made or declared, or that hereafter shall make or declare any such will of any such lands, tenements or hereditaments, after his decease to be sold by his executors."

With a proviso, that this act should "not extend to give power or authority to an executor or executors, at any time thereafter, to bargain, or put to sale any lands, tenements or

hereditaments by virtue and authority of any will or testament theretofore made, otherwise than they might do by the course of the common law afore the making of this act."

And this statute has been construed to extend as well to lands which are actually devised to two or more executors, as to lands over which there is merely an authority (*k*). Some gentlemen confine this act to executors, being trustees of the will ; while other gentlemen consider all trustees of a will for the sale of real estate as executors within the scope of this act.

But it is right to have a disclaimer from the trustee who refuses to act, as affording direct and certain evidence of his refusal. A deed of disclaimer is preferable to a re-lease or conveyance ; for a conveyance, and perhaps even a re-lease, unless very specially penned, is evidence of a previous acceptance of the trust (*l*).

When an authority is given in terms to several, and the survivors and survivor, and to the heirs, or to the executors, &c. of the survivor, it may be exercised by any of the persons when they answer the descriptive terms of the power.

But if an authority be given to three persons *nominatim*, as to *A B*, and *C D*, &c. ; it must be exercised by all of them, except in the

(*k*) 1 Inst. 113 a ; *Bonifant v. Greenfield*, Cro. Eliz. 80.

(*l*) *Crewe v. Dicken*, 4 Ves. 97.

case of a will, and the refusal of one or more of the trustees to act. So that after the death of one of those persons, the authority will be at an end. But under trusts annexed to an estate the surviving trustee may sell.

So when an authority is given to executors, *eo nomine*, it seems the better opinion, that the executors for the time being, and even the executors of the surviving executor, may exercise this authority (*m*), and unless the contrary be declared, these authorities are merely *personal*; and in consequence of the rule *delegatus non potest delegare*, these authorities cannot be exercised by means of a deed executed by attorney (*n*).

Such authorities occur for the most part in wills, by which power is given to executors to sell, or to mortgage; and, in particular, to sell copyhold lands for the purpose of giving a title to the bargainee, immediately under the testator himself, without any necessity for the admission of his executors.

Authorities also arise from acts of parliament, as under the bankrupt laws, and for the redemption of the land-tax, and under conveyances to uses, as powers to appoint in favour of children, powers to trustees to sell and exchange, to make partition, and the like powers.

For though these authorities are generally

(*m*) Coke Litt. 113 a; and note (2).

(*n*) Combe's Ca. 9 Rep.; Hawkins v. Kemp, 3 East 410.

called powers, and they are powers in their mode, yet they are more properly considered as authorities.

The person to whom they are delegated is merely a trustee, and hence *naked* authorities ; as authorities to appoint in favour of children are construed strictly.

Naked authorities should be exercised purely and gratuitously for the benefit of the object of the power, and not for the benefit of the person by whom the power is to be exercised.

Any fraud in the exercise of the power will vitiate the appointment, at least in equity ; and in many cases the appointment may be void, even at law (*o*), for fraud in the exercise of the power.

Also, if the power be to appoint in favour of children, or all the children, an appointment so made as to exclude some or one of the children will be void.

But such a power authorizes appointments at different times, and an appointment may be good if it appoint part of the subject, and leave a share not merely illusory unappointed. Such appointments as are originally good will not be affected by any subsequent contravention of the power. That appointment alone which is inconsistent with, and first contravenes the power, will be void (*p*).

(*o*) *Doe and Martin*, 4 Term Rep. 39.

(*p*) *Dorrell v. Routledge*, 2 Ves. jun. 357.

Powers, however, may be so expressed as to give a right of *selection*; and under such powers an appointment, made *bona fide*, may be to some or one of the children, or other objects, in exclusion of the other or others of them.

Of this description are those powers which enable the party to appoint to any one or more of the children, &c. &c. or are in favour of *such* children, &c. as the donee of the power shall appoint.

Authorities in wills differ from authorities in conveyances to uses, in one material circumstance.

Under authorities of the former description, a common-law *seisin*, and under authorities of the latter description, an *use* to be executed by the statute, will be given.

Hence the distinction, that in the former case *uses* may be declared of the *seisin* of the appointee or *bargainee*, and be executed by the *statute of uses*, and in the latter case an *use* declared of the *estate* of the appointee, will be an *use* on an *use*, and, for that reason, a mere trust or equitable interest, not executed by the statute.

In considering the actual state of titles, this distinction should be constantly kept in mind: and as often as in the exercise of a power to appoint to *uses*, an appointment is made to *A* and his heirs, to the *use* of *B* and his heirs, the legal estate must be considered as vested in

A, subject to a trust or equitable interest in favour of *B*.

These observations, however, suppose the legal estate to have been conveyed, to supply a seisin to the uses, and that the power is a power, by way of use, over the legal estate.

For if the person by whom the settlement was made has only an equitable interest, all the uses and trusts declared by that settlement, whatever may be its language, will be merely the modifications of the equitable ownership; and then equity regards the substance, and not the form, of the conveyance; and the estate will, in equity, be in the person for whom the beneficial ownership is intended; and the person in whose favour the use, in the second degree, is declared, will be considered as the beneficial owner.

Persons who have merely authorities do not, in strictness, *convey*. They sell or appoint. The title is derived immediately from the authority, and from the person by whom that authority was delegated; so that under an authority to sell in a will, the vendee derives his title merely by the rules of the common law, and consequently, an use may be declared of his seisin.

And till the authority is exercised, the seisin remains undisturbed. Thus, in the case of an authority to sell, given by a will, the seisin remains in the person, if any, to whom the same is devised; and if no devise is made of the seisin,

then in the heir at law, till the authority be exercised (*q*).

So under authorities given by the statute law, the seisin remains, of necessity, and to avoid abeyance, in the bankrupt or other former owner, till the authority shall be exercised. But when the authority is exercised, it will overreach and defeat all estates, charges, and encumbrances, affecting the seisin, and being subsequent to the creation of the authority.

Thus, if *A* have an authority to appoint among his children, the right of taking under the exercise of this authority is an interest in the children, and may be re-leased by them. The re-lease should be to the person whose ownership will be affected by the exercise of the authority ; and not to *A*, as the donee of the power.

This conclusion flows from the principle *unum quodque dissolvi potest, &c.*

As no interest resides in the person to whom the authority is given, neither the doctrine of nonclaim, nor of estoppel will preclude the exercise of the authority.

A feoffment, or a fine, with a deed of uses, or any other instrument purporting to be a deed of sale, may amount to a sale in exercise of the authority ; but a feoffment, or fine, will not extinguish the authority, or bar the right of exercising the authority. Although it is the

acknowledged operation of a fine to bind all rights, present or future, which are in the person by whom the fine is levied ; yet the case of a naked authority is not within the scope of the general rule ; since the authority is an interest in the persons who are to be benefited by the exercise of the authority ; and not in the persons to whom the authority is given : and authorities to sell, &c. are not barred by the operation of nonclaim on fines (*r*), because, till the exercise of the authority, there is not any person who can maintain a *claim* by virtue of the authority : but from the moment the authority shall be exercised, the person who shall be entitled to an estate by means of the authority, must assert the title within the period limited by the statute of nonclaim on fines, or he will be barred by his nonclaim.

As a deed exercising an authority at the common law, is properly considered as a sale, or as a bargain and sale, a deed of bargain and sale is the more usual form of exercising an authority of this description, and even copyhold lands are bargained and sold by deed, and such bargain and sale is presented at the lords court, and the bargainee admitted : but an instrument, in any other form, as well as an instrument in the form of a bargain and sale, will produce the same effect ; for example ; a lease and re-lease, in exercise of an authority

(*r*) 1 Inst. 237 a; 1 Rep. 174; *Willis v. Shorrell*, 1 Atk. 474.

over freehold land, will operate in the mode of a sale, or bargain and sale.

These bargains and sales owe their effect to the rules of the common law. They are not within the statute of enrolments. That statute is applicable only to bargains and sales which have their effect under the statute, for transferring uses into possession. Hence it follows, that bargains and sales under authorities do not require enrolment, except so far as enrolment is prescribed by the deed, will, or act of parliament, by which the authority was created.

Bargains and sales under the land-tax acts, and under the statutes against bankrupts, require enrolment by the express provisions of these statutes; and entails in bankrupts cannot be barred unless the bargain and sale be enrolled within six months.

It is also to be remembered, that sales under authorities, in a conveyance to uses, receive the denomination and have the effect of *appointments*, and not of bargains and sales. Thus, if a man by his will give to another power to sell, and a sale is made to *B*, *B* must be considered as a *bargainee* or *vendee*, and must plead the will, and the instrument of sale as his title; but when a conveyance is made to uses, with a power to sell, and a sale is made by virtue and in exercise of the power, the vendee must be considered as the *appointee* of

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the use, and he must plead his seisin as derived under the conveyance to uses, and the deed of sale, and the statute for transferring uses into possession.

These observations have been extended to a considerable length, from a conviction of the importance of forming accurate opinions on points which affect the legal title.

It will be proper to take a collective view of the law, as it is applicable to the objects of a power.

The objects of a power are the persons who are to take under the exercise of the power, when the power is to appoint among particular persons, or some of them, as in the instance of powers in favour of *A B*, and *C D*, or in favour of a class of persons, as children, or of any or either of them.

The power of making the appointment is a mere authority; but the right of taking under the appointment is an interest, a benefit.

These consequences follow :

The person to whom the power is given may exercise the power, but he cannot re-lease it, nor, according to the more prevailing opinion, (an opinion combated by Mr. Sugden, who is supported by some gentlemen of great learning,) will it be extinguished by his fine, &c.

But the person in whose favour the power is to be exercised may re-lease the right of taking under the power. This may be accomplished

by making a feoffment (*s*), levying a fine, or by a re-lease.

But some powers are an interest in the person to whom they are given; as powers to revoke and appoint new uses for a man's own benefit; powers to jointure (*t*), to lease, to charge, or to raise money for his own benefit; and all such powers may be re-leased or defeazanced, and consequently varied or modified (*u*).

No title requires more care than one which depends on a power. All the circumstances of the power must be pursued, except in a few particular cases in which equity supplies a defect in the execution of the power; as in favour of a wife, children, or creditors, or purchasers for a valuable consideration.

Most powers have circumstances, prescribing the persons by whom, the time at which, and the mode in which they are to be exercised, the estate to be appointed, and the ceremonies which are to attend the exercise of the power; and it is prudent to analyze the power, to divide it into parts, and to collect the different circumstances required to its valid exercise; and then to refer to the deed or will exercising the power, and see that all these circumstances have been observed.

1st, As to the persons.

(*s*) *King v. Melling*, 1 Ventr. 214.

(*t*) *Ibid.*

(*u*) *Digge's case*, 1 Co. 173; and *King v. Melling*, 1 Ventr. 214.

In titles under authorities, particular care must be taken that the authority was exercisable by those persons under whose appointment the title is derived.

An authority to *A*, *B*, and *C*, cannot be exercised by two of them, except the case fall within the statute of 21 Hen. VIII. ; nor then unless there be a disagreement or disclaimer by the other trustee.

An authority to be exercised, with the consent of *A*, cannot be exercised *without* such consent ; nor after it is become impossible by the death of *A* that such consent should be given (*x*).

An authority to the survivor of *several* persons cannot be exercised until the survivor shall be ascertained ; and therefore an attempt by both the persons, to exercise the power will be nugatory, since the survivor is not ascertained (*y*).

But an authority to executors, *eo nomine*, or to sons in law, *eo nomine*, may be exercised by the *class*, after the death of some of them, and while the words of the power can be satisfied (*z*). This subject affords a large head of investigation, with many and nice distinctions.

When no person is named by whom an authority contained in a will shall be exercised,

(*x*) Dyer 219; *Mansell v. Mansell*; *Wilmot's Rep.* 36.

(*y*) *Doe v. Tomkinson*, 2 Maule and Selwyn 165.

(*z*) *Townsend v. Wale*, Cro. Eliz. 524, Jenk. Cent. 44.

then there is a difficulty in ascertaining from whom the legal estate shall be taken.

When the sale is to be for purposes connected with the office of executors, then the authority is, by construction of law, to be exercised by the executors (*a*).

This point is universally conceded. In other cases, it is doubtful whether the executors shall sell as having an authority; or the heir shall sell and convey as bound by a trust (*b*).

According to a case in 2 Leon 22, the executors shall sell; while according to *Pitt v. Pelham* (*c*) the heir is a trustee to sell.

The authorities are collected in *Powell on Devises* (*d*).

Although executors renounce the probate of the will as to personal estate, they are not, by such renunciation, disqualified to execute an authority of sale, &c. over real estate (*e*).

So a power given to a person, to be exercised while under coverture, or while sole, cannot be exercised by the person to whom it is given, when that person is differently circumstanced.

So a power given to a person, to be exercised when in possession, or when in receipt of the rents, &c. cannot be exercised till he is in possession, or in receipt of the rents.

(*a*) 1 Anderson 145, Keilw. 45.

(*b*) *Pitt v. Pelham*, 1 Lev. 504; *Yates v. Compton*, 2 P. W. 308; *Blatch v. Welsh*, 1 Atk. 420.

(*c*) 1 Lev. 304, 1 Ch. Cas. 176; *Yates v. Compton*, 2 P. W. 308. (*d*) Page 292.

(*e*) 2 P. W. 309; Keilw. 44 b.

In equity, however, a person may contract to exercise a power before the power is in *esse* and the moment the power shall vest, or be exercisable, the contract will in equity be deemed a valid exercise of the power (*f*) ; and a power well exercised in equity will be binding on the party and his heirs, the issue in tail, and also on all persons in reversion or remainder (*g*). The like observation applies to contracts by persons having a power of leasing (*h*).

To most powers of this kind there is added as a qualification, when he shall be in possession or in receipt of the rents by virtue of the limitations hereinbefore contained.

And a question arises, whether the right to exercise this power can be accelerated by the surrender or other determination of the prior estate. It is clear, that a mere assignment of a prior life-estate will not qualify the assignee as having such estate to exercise the power; for he is not seized by virtue of the limitations in the deed creating the power in the sense in which this phrase was used.

2dly, When a power is to be exercised at a given time, as after the death of *A*, it cannot be exercised at law during the life-time of *A*.

But an exercise of the power, by a contract

(*f*) *Coventry v. Coventry*, Str. Rep. 596; *Tollet v. Tollet*, 2 P. W. 489.

(*g*) *Coventry v. Coventry*, Str. 596.

(*h*) *Schoales and Lefroy's Rep.* 52—61.

in equity, in the life-time of *A*, will be binding only from the death of *A*; and in the event only, that the donee of the power shall be living at the death of *A*.

In like manner, a power given to be exercised on any other event, cannot be exercised with effect till that event is arrived.

3dly, When a power prescribes the mode in which it shall be exercised, that mode must be observed.

A power to appoint by deed cannot be exercised by will; nor can a power to appoint by will be exercised by deed. But a power to appoint by deed or *instrument in writing*, or by deed or *writing*, may be exercised as well by a will as by a deed (*i*).

And in favour of the objects who are peculiarly under the protection of courts of equity, viz. purchasers, creditors, wives, and children, a court of equity will supply a defect of circumstances, in the execution of a power.

In other words, when there is a declared intention of exercising the power, a court of equity will give effect to that intention, notwithstanding the omission of some circumstances. But when no step has been taken towards the execution of a power, a court of equity cannot, in the absence of all intention to exercise the power, consider the power as exercised.

(i) *Kibbett v. Lee*, Hob. 312; *Pulteney v. Darlington*, Cowp. 260.

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All that a court of equity can do is to supply a defect in the execution of a power. It cannot of its own authority *execute* the power.

The court of equity may therefore relieve when there is a defective *attempt* to execute a power; but cannot relieve when the donee of the power is *passive*, so that there is a non-execution of the power. *Non-execution* of a power is where nothing is done. Defective execution is where there has been an intention to execute, and that intention sufficiently declared; but the act declaring the intention is not an execution in the form prescribed (*k*).

So if a power require that a deed shall be signed, signature is essential to the valid exercise of the power, though not requisite by the general rules of law.

Also, when a power is required to be by deed *signed*, "sealed, and delivered, *and attested*," or to be by deed under hand and seal, and attested then, as already shown (*l*); the appointment under the power will not be valid unless the fact of signature, as well as of sealing and delivery, shall be attested (*m*).

But when a deed is required to be under hand and seal, or signed, sealed, and delivered, but the power does not require that the deed, or the facts of signing, &c. should be attested, then the appointment will be good, if it appear

(*k*) *Shannon v. Bradstreet*, 1 Schoales and Lefroy 63.

(*l*) 1 Vol. (*m*) *Wright v. Wakeford*, 17 Ves. 454.

to be signed, sealed, and delivered, although the attestation be silent respecting the mode of execution.

In one instance, attestation is essential to the valid exercise of the power; and no proof of the mode of execution can be deemed a substitute for the want of attestation; but in the other instance no attestation is requisite; and it will be sufficient to prove the facts of signing, sealing, and delivering by the witnesses.

This is all the chancellor meant to say in *M'Queen v. Farquhar* (*n*), although from the language of the report it would seem that this observation was applied to an instrument made under a power which required attestation. This explanation was given by the chancellor on the argument of *Wright v. Wakeford* (*o*).

So if a deed be required to be *enrolled*, this ceremony must be observed; and such enrolment must be made in the life-time of the party (*p*); unless a time be limited within which the enrolment is to take place; and in that case the enrolment must be within the limited period.

So if a deed or will be required to be attested by a given number of witnesses, it must be attested by that number of witnesses; and if it be prescribed that they should be of a given

(*n*) 11 Ves. 467.

(*o*) 17 Ves. 454.

(*p*) *Digge's case*, 1 Rep. 173; *Hawkins v. Kemp*, 3 East 410.

rank, as peers, or not of a given description as menial servants, this qualification must be observed.

And it frequently occurs that though the title be objectionable, as far as it depends on the power, it is good under the ownership. For example: lands are conveyed to such uses as *A* shall appoint by deed, &c.; and in default of appointment, either immediately or ultimately, to *A* in fee, and *A* appoints, and also conveys; the title, though objectionable under his appointment, may be good under the ownership.

4thly, In the exercise of a power created in favour of particular persons, as children, or *A*, *B*, *C*, *D*, and the like, the power must be exercised in favour of persons of that description.

A power to appoint to *B* will not authorize an appointment to *A*; and a power to appoint in favour of children, will not warrant an appointment to grand-children.

But a power to appoint in favour of the issue of *A* will warrant an appointment to any of his descendants; provided the word issue be used in this collective and comprehensive sense.

It is a deduction from these observations, that a power to appoint in favour of children will not authorize an appointment to a child for life, with remainder to his first and other sons or children. But in wills, under the doctrine of *cy pres*, such an appointment will, as to freehold,

lands, and for the purpose of giving effect to the general intention, be construed to give to the child who is the object of the power, an estate-tail corresponding with the gift to the donee and his descendants (*q*).

But the doctrine of *cy pres* is not admitted in limitations of leasehold or personal estate (*r*), or gifts of the fee-simple.

It was also considered as settled, that a power to appoint to *A* would not, except the language of the power was special, authorize an appointment to *B* in trust for *A* (*s*).

The late decisions however (*t*) have unsettled this point. But these cases, properly understood, cannot be carried farther than to admit that there is a good execution of the power in equity. It is impossible, it is apprehended, to support these cases as authorities for a valid exercise of the power at law.

So a power to appoint the land will not at law authorize an appointment of *a charge*. But in some cases equity will support the charge in favour of a wife, children, or creditors.

Sometimes a power is to appoint amongst *all and every* the children, or among several persons, naming them; or unto and among such

(*q*) *Humberstone v. Humberstone*, P. W. 333; *Robinson v. Hardcastle*, 2 Term Rep. 241; *Pitt v. Jackson*, 2 Bro. C.C. 51.

(*r*) *Somerville v. Lethbridge*, 6 Term Rep. 213.

(*s*) *Thwaites v. Dye*, 2 Vern. 80.

(*t*) *Long v. Long*, 5 Ves. 445; *Kenworthy v. Bate*, 6 Ves.

children begotten between us, and in such proportion as the wife shall appoint (*u*) ; and in these cases an exclusive appointment to one will be void (*x*).

However an appointment of part to one, leaving a share not illusory, to go as in default of appointment, will be supported (*y*).

So if an appointment be of part to one, and then another appointment, which is vicious, from the circumstance that it appoints the *whole* to one in exclusion of the others, in whose favour no appointment has been made ; the defect in the second appointment will not vitiate the former appointment. But the residue only which is defectively appointed will go, as it would have done in default of appointment (*z*).

And by express words, *a right of selection* may be given ; so that an appointment may be to any one or more of the objects, in exclusion of the other persons ; and it is frequently a question of construction, whether the power confer a right of selection.

It has been decided, that a power to appoint to such of my children as my wife shall think fit (*a*) ; or to one or more of my children, as my wife shall think fit (*b*) ; or to or among

(*u*) *Alexander v. Alexander*, 2 Ves. sen. 640. Qu. this authority.

(*x*) *Malim v. Keighley*, 2 Ves. jun. 533; *Maddison v. Andrew*, 1 Ves. sen. 57; *Morgan v. Surman*, 1 Taunton, 289.

(*y*) *Routledge v. Dorrell*, 2 Ves. jun. 357. (*z*) *Ibid.*

(*a*) *Liefé v. Sallingstone*, 1 Mod. 189.

(*b*) *Thomas v. Thomas*, 2 Vern. 513.

such of my relations, in such parts, &c. as, &c. (c), will confer this right of selection.

5thly, When the power specifies the estate to be appointed; as, for life, or in tail; for ninety-nine years, &c. that estate, and no other, can, at law, be effectually appointed; but in some cases equity will support the appointment as far as it is within the scope of the power, and reject the excess; provided a line can be drawn between the limits of the power and its excess. This may be done in appointment for years, but not in appointments for lives, &c.

A power in terms, or in sound construction, to appoint in fee will not authorize an appointment in tail, nor the converse (cc). And yet a custom to grant copyhold lands in fee, and *non aliter*, will warrant a grant of an estate-tail under the maxim, *omne majus in se habet minus* (d).

A power to appoint for life will not authorize an appointment of the inheritance, nor an estate for years determinable on lives (e).

Nor will a power to appoint for years determinable on lives warrant an appointment for lives; one interest being of a chattel, and the other interest being of a freehold, quality. But a power to appoint for twenty-one years will authorize an appointment for twenty years; and when the power is to appoint for any term, &c.

(c) *Spring v. Biles*, 1 Term Rep. 435, note.

(cc) See Qualifications; Sug. 355.

(d) 2 Lord Raym. 999.

(e) Sug. on Powers, 368.

not exceeding, &c., then care is to be taken that the estate should not, in its duration, transgress the limits of the power.

6thly, Whatever other circumstances are required to the valid exercise of the power, as the reservation of rent, a condition, and the like, must be observed (*f*). A lease was made of land, of which the lessor was seised in fee, and of other lands of which he was seised for life, with a power of leasing at the best rent. The lease was at one entire rent, and therefore was not valid according to the power; but it was held, that the lease was good after the death of the lessor for the lands in fee, though not for other lands, for the rent may be apportioned.

In short, the appointment must be consistent with the intention of the author of the power.

It will be useful to advert to the distinctions between *general powers*, which are interests, and *special powers*, which are *authorities*.

General powers, being interests, are construed favourably. They may be exercised upon condition: a power of revocation may be annexed to appointments under these powers; and the owner of this power may appoint in like manner as if he were the owner of the estate; for instance, he may appoint to one for life, with remainder to his first and other sons, although such appointment would not

(*f*) *Doe on the Demise of Vaughan against Meyler*, 2 Maule and Selw. 276.

have been good, if inserted in the deed by which the power was created.

This has been questioned by Mr. Powell.

But the conclusion is warranted by general and established practice.

So a general power to *A* to appoint to such uses as he thinks fit, will enable him to make an appointment to such uses as *B* shall appoint; not so of a power of nomination, which is a mere authority. Under a power of nomination, a person who has a power to appoint, cannot, without an express authority, delegate the power to another.

It was formerly supposed that he could not reserve to himself a power of revocation and new appointment. It is now agreed that he may reserve such power (*g*). The effect of a revocation will be to revive the original power, so that it may be exercised again and again; but it should seem that every subsequent appointment must be an appointment by virtue of the original power, and therefore must have all the circumstances required by that power.

So a person who has a mere authority cannot appoint to any person except those who are within the scope of the power; and by the rule of perpetuities, he is restrained from appointing to any person, except those who might have taken under the will or settlement by which the power was created, in like manner as if

(*g*) *Held v. Bond*, Prec. Cha. 474.

the limitations had been introduced into that settlement.

At one period it was doubted whether such power would warrant the appointment of an estate *for life* to a person unborn. It is now settled, as already shown (*h*), that it will. But with the restriction, that all limitations over will be too remote and void unless they are warranted by the language of the power; and also unless they would have been good under the circumstances in which they are made, if they had been inserted in the will or settlement containing the power. A power to lease for lives does not authorize the nomination of lives not in *esse* (*hh*).

The true test, therefore, of the validity of any estate or interest, made by way of appointment under a power of this sort, is to read the appointed interest, as if inserted in the settlement itself; and consider whether it would have been good if it had been introduced into that settlement; and also, whether it be in other respects warranted by the power of appointment; for if it be objectionable on either of these grounds, the title, as far as it depends on the appointment, will be defective.

Another rule applicable to these powers, and derived from the learning of authorities, is *delegatus non potest delegare*; in other words, a person who has a mere authority to appoint,

(*h*) p. 168.

(*hh*) Raym. 263; *Doe v. Halcombe*, 7 Term Rep. 713.

cannot confer on another person the power of exercising that authority, either in his own name, or even as the attorney or substitute of the person to whom the power was given (*i*).

But the rule must be understood with the qualification that no power to delegate the authority is given. For as an authority may be delegated under an express power for that purpose, so may a power which partakes of the nature of an authority; and therefore it is agreed, that a power to *A*, or to his assigns, to lease for twenty-one years, may be exercised by the assignee (*k*).

So, beyond all doubt, a power to be exercised by *A* in person, or by attorney, may, in consequence of the express delegation, be exercised through the medium of the attorney, although this could not have been done under the general rules of law, without an express stipulation for the purpose.

It remains to be observed that powers are either of revocation or new appointment.

Every power to appoint, does, in effect, include in itself a power to revoke. But a power to revoke will not authorize a new appointment; and therefore if *A* convey to uses, with a power to revoke these uses, and he exercise that power, he cannot raise any further uses by way of appointment. The effect of the revocation will

(*i*) *Combe's case*, 9 Rep.; *Hawkins v. Kemp*, 3 East 410.

(*k*) *How v. Whitfield*, 1 Vent. 338, 339.

be to revest the seisin in himself, discharged of the uses.

To raise further uses there must be a new conveyance (*l*).

But on the contrary, when a man has a power of appointment, and he exercises that power, with the addition of a power of revocation, this power is annexed to the uses introduced into the appointment; and by revoking the uses contained in the deed of appointment, there will be a revival of the original uses, and among them, of the power of appointment.

It is obvious then that there is a material difference, on the one hand, between a conveyance to uses, with a power to revoke these uses; and, on the other hand, a deed of appointment, with a power of revocation, when such appointment and revocation are in exercise of a power contained in a deed of uses.

As a general summary, it may be observed, that titles depending on powers and authorities require attention in these several particulars :

It is to be seen,

1st; That there was a power or authority duly created :

2dly, That the power has been exercised by the persons to whom the power or authority was given :

3dly, That the power has been exercised in favour of persons capable of taking under the power :

(*l*) *Hele v. Bond*, Prec. in Chancery, 474.

4thly, That the appointment is of a subject within the compass and extent of the power ; and in some instances it must be seen that there are not more, and in other instances that there are not fewer, parcels than are compatible with a due exercise of the power.

5thly, That the appointment is for such estates, &c. as were authorized or warranted by the power :

6thly, That all the conditions, ceremonies of signing, sealing, delivery, attestation, enrolment, &c. required by the power, have been observed.

And when a deed, will, or other instrument, cannot operate as a valid exercise of the power, it will be for consideration, whether the title can be supported under the ownership, which existed independently of the power of the intended appointers.

And as equity will, under circumstances, supply the defects in the execution of a power in favour of purchasers, wives, children, and creditors, there may be a good title in equity under the power and the intended appointment; and the defect in the legal title will be supplied by that court.

These observations merely detail the principal distinctions to be regarded in considering titles depending on the exercise of powers. Whoever determines to take that comprehensive view of the subject which its importance merits, should investigate the law through

the medium of Mr. Sugden's book on Powers, and the collection of cases, &c. by Mr. Powell.

The annotations of Mr. Butler on Coke on Littleton, and his Practical Observations *, contain an useful summary and general view of this subject ; a subject which, with reference to modern practice, demands more attention than any other head of the law.

As titles are either rightful or wrongful, it will be proper to consider the nature of seisin and disseisin ; conveyances which are rightful, and conveyances which are wrongful ; and the relative situation of disseisor and disseisee ; and the effect of the statute of limitations, and non-claim on fines, on titles which are wrongful.

As the title to the legal estate may be changed by disseisin, it will be in course to take a view of the general rules applicable to the law

Of Seisin and Disseisin.

THE doctrine of seisin and disseisin, though occurring every day in practice, and though involving the most important learning of titles, is rarely studied with the attention it deserves ; and it is lamentable to see how the law is sometimes applied, in practice, to subjects which involve this learning ; taking modern notions

* A MS. of great utility, to which the present writer was, early in life, indebted for a large portion of information.

of convenience, and not principle, as the guide. The judgment in *Taylor v. Horde* (*m*), has confounded the principles of law, and produced a system of error.

All the difficulties of the law, all the niceties of title, all the higher branches of knowledge on the rules of property, are involved under this learning.

A schoolmaster, every village lawyer, may be excused for ignorance on subjects which never come under his notice, or cross his imagination; but it is truly lamentable to hear lawyers treat subjects of this importance as if they were unintelligible, or as if they were devoid of principle, or as if they were no longer of utility, or subservient to the purposes of justice.

Without recurring to the doctrine of disseisin how is it possible to apply the learning of titles as between man and man? or the operation of the statutes of nonclaim on fines; the bar by the statute of limitations; the learning of descents which toll entries; the change of the remedy from ejectment into a real action; or to understand the cases which render it necessary to consider a deed to be operative as a re-lease, and not as a conveyance; or as a deed which does, or as a deed which does not, admit of a declaration of uses?

With the fullest conviction of the importance of the subject, it will be worth while to bestow

some time on this branch of the law, and to consider,

1st, What constitutes a *seisin*, and what are the consequences of a *seisin*:

2dly, The different species of *disseisin*, and the consequences which are induced by *disseisin*; and under this head the difference between *dispossession* and *disseisin* will be considered:

3dly, The relative characters and situations of the *disseisor* and *disseisee*:

4thly, The means by which an estate which was wrongful may become rightful; or which was defeazible, may become indefeazible in point of title.

1st, What constitutes a *seisin*; and what are the consequences of *seisin*.

Seisin may be defined to be the feudal investiture, in other words, the completion of that investiture, by which the tenant is admitted into the tenancy.

It is the consummation of an act as descent; or of a conveyance.

When rightful, it induces that relation which establishes the connection between lord and tenant. The ownership, whether rightful or wrongful, is clothed with those requisites by which a man becomes actually seised, either in fact or in law; in other words, by which he obtains an estate, as distinguished from a contingent or executory interest on the one hand,

and from a right or title of action, or of entry on the other hand.

According to Lord Coke (*n*), seisin signifies in the common law, possession.

This observation was applied to a seisin in demesne. Such seisin is of the freehold; but there may be a seisin in law of a reversion or remainder (*o*).

Mr. Watkins maintains, with great energy, that seisin is properly and strictly confined to the possession of the freehold.

Seisin is correctly investiture, or an estate in the land, according to the feudal relation.

Thus we have the phrases, ‘seised in possession,’ ‘vested in possession,’ ‘seised in reversion or remainder,’ ‘vested in reversion or remainder.’

At all events, these are the phrases which practice has adopted to designate the qualities of different interests.

A man who has a seisin necessarily has an estate in possession, in reversion, or remainder. He has an interest which is transferable under the rules of the common law, in the modes prescribed by those rules.

As often as his estate confers a right to the possession, he may transfer his estate by livery of seisin; in other words, by feoffment; by a fine which pre-supposes a feoffment; by a fine or common recovery, operating as a grant; or by a

(*n*) 1 Inst. 153 a.

(*o*) Watk. Descents, 40, 41.

lease and re-lease, which are said to countervail a feoffment; that is, for all the purposes of conveyance, though not for collateral purposes, to produce the effect of a feoffment.

In point of fact, and in construction of law, the lease and re-lease, though parts of the same assurance, are distinct acts; being in the first place a lease for years; and secondly, a grant or re-lease in enlargement of that estate.

When the owner has merely an estate in reversion or remainder, he may transfer that estate by grant to a stranger, or by a re-lease or confirmation in enlargement of the estate of a particular tenant, when the estate of that tenant is so circumstanced that it admits of enlargement.

Contingent remainders, and executory interests by devise, or by shifting or springing use, are on the one hand to be distinguished from estates, and on the other hand from rights or titles of entry. These executory interests depend on the seisin; are derivable out of it, and in fact constitute a part of the ownership; while rights or titles of entry, or of action, are claims existing in opposition to the seisin, and depend on a distinct title. They are adverse and conflicting rights, depending on the title under a former seisin, which has been divested.

The interests under contingent remainders and executory devises, are devisable by will, but at law they cannot be granted to a stranger. They may, when the owner is ascertained, be

re-leased to the owner or terre-tenant ; that is, the person having the seisin ; though they cannot be granted or re-leased to a stranger.

They may be bound by estoppel, as by feoffment, fine, common recovery, or indenture of lease ; and a contract made by this beneficial owner will be enforced in equity, when the contingent remainder or executory devise shall confer a vested estate. This has been shown in former observations.

Disseisin is the privation of seisin. It takes the seisin or estate from one man, and places it in another.

It is an ouster of the rightful owner from the seisin (*oo*). It is the commencement of a new title, producing that change by which the estate is taken from the rightful owner, and placed in the wrongdoer.

Immediately after a disseisin, the person by whom the disseisin is committed, and who is called the disseisor, has the seisin or estate ; and the person on whom this injury is committed has merely the right or title of entry. This right, or title of entry, may, by a descent which tolls entry ; by the bar of the remedy by ejectment, under the statute of limitations, and, in some cases, by a re-lease with warranty, be changed into a mere right of action ; and ultimately may be barred or extinguished, according to the difference of circumstances ; by re-lease

or confirmation; by warranty; by nonclaim on a fine; or by the operation of the statute of limitations.

As soon as a disseisin is committed, the title consists of two divisions; first, the title under the estate or seisin; and secondly, the title under the former ownership; and these distinct interests must be kept steadily in view; till they are united, or the right is barred.

There are four species of disseisin:

1st, Disseisin properly so termed:

2dly, Abatement:

3dly, Intrusion:

4thly, Discontinuance or deforcement.

The three first sorts of disseisin proceed from strangers; and to this purpose even a remote heir is a stranger. The fourth sort proceeds from a person already in the seisin, but having only a particular estate.

Actual disseisin is against the person who actually has the freehold (*p*); while abatement is against the heir, in the interval between the death of the ancestor, and the entry of the heir, while he has merely a seisin in law; and intrusion is against a person who has a seisin under a reversion or remainder, and not the actual seisin of the freehold, in the interval between the death of a person who has a particular estate, and the entry of the person who has the reversion or remainder; and discon-

tinuance and deforcement are disseisins, arising from the alienation of a particular tenant, to the prejudice of those who have an interest in remainder or reversion, expectant on his estate.

2dly, Of the different sorts of disseisin.

Disseisin, simply so termed, is an entry by a stranger, on the possession of the person who by himself or his tenant (*pp*) has the actual freehold, and an ouster of that person.

The law always favours the rightful owner, and considers him in the seisin, as often as this can be done consistently with the fact.

The maxim is *duo non possunt in solidio, unam rem possidere* (*q*). Thus, an actual and formal disseisin is a wrong by which the actual seisin is divested, by the act of a stranger entering on the rightful owner; or at least on the person having a right to the possession.

Therefore, when two persons are in possession, and one of them only has the right, the law will consider the seisin to be in that person alone who is the rightful owner.

In this case the stranger is merely in possession; he has no seisin; or, in law, possession. He may be a *trespasser*. He may be a disseisor only at election; but he is not an actual disseisor (*r*).

Disseisin at election is not a disseisin in fact. A large portion of the learning in the books is

calculated to mislead, rather than inform, the reader. In cases of disseisin at election, the rightful owner has in reality the actual seisin, and supposes himself to be disseised solely for the purpose of trying the title in an assise, instead of bringing an action of trespass.

Where a man is in possession of his house, or his farm, no entry on him by a stranger can be a disseisin to him; for, though there be an actual entry, yet, while the rightful owner continues in possession, by himself or his tenant, the seisin cannot be changed, or gained as against him.

By construction of law, the possession of a *tenant*, even for years, is the possession, or rather the continuance, of actual seisin (*s*) of those in reversion or remainder, except as between different persons claiming as heirs (*t*); and the continuance of seisin by tenant for life, or in tail, or of any other particular estate, is the continuance of seisin to those in reversion or remainder. Hence the following passages:

(*u*) "If *A* of *B* be seised of a *mese*, and *F* of *G*, that no right hath to enter into the same *mese*, claiming the said *mese*, to hold to him and to his heirs, entreth into the said *mese*; but the same *A* of *B* is then continually abiding in the same *mese*; in this case, the possession of the freehold shall be always adjudged in *A* of *B*, and not in *F* of *G*; because, in such

(*s*) 1 Inst. 243 a.

(*t*) Ibid.

(*u*) Litt. § 701.

case, where two be in one house, or other tenements, and the one claimeth by one title, and the other by another title, the law shall adjudge him in possession, that hath right to have the possession of the same tenements, [except the rightful owner had merely a right of action, and not of entry; and also, except an entry by two daughters, one being bastard *eigne*, the other *mulier puisne* (*x*).] But if in the case aforesaid, the said *F* of *G* make a feoffment to certain barrettors and extortioners in the country, to have maintenance from them of the said house, by a deed of feoffment with warrantie, by force whereof the said *A* of *B* dare not abide in the house, but goeth out of the same, this warranty commenceth by disseisin, because such feoffment was the cause that the said *A* of *B* relinquished the possession of the same house.

So (*y*) "as long as the donee in tail, lessee for life, or lessee for years, are in a possession, they preserve the reversion in the donor or lessor; and so long as the reversion continue in the donor or lessor, so long do the rents and services which are incident to the reversion, belong to the donor or lessor. Neither can the donor or lessor be put out of his reversion, unless the donee or lessee be put out of their possession; and if the donee or lessee be put out of their possession, then consequently is the

(*x*) 1 Inst. 368 a.

(*y*) 1 Inst. 324 b.

donor or lessor put out of their reversion. But if the donee or lessee make a regress, and regain their estate and possession ; thereby do they *ipso facto*, [except the entry of the reversioner be tolled (z),] revest the reversion in the donor or lessor.

And (a) “ when a man hath a reversion, he cannot be ousted of his reversion by the act of a stranger, unlesse that the tenant be ousted of his estate and possession, &c: For as long as the tenant in tail and his heires continue their possession by force of my gift, so long is the reversion in me and my heires ; and in as much as the rent and services reserved upon such gift be incident and depending upon the reversion, whosoever hath the reversion shall have the same rent and services, &c. (b) ”

And if a termor for years be ousted, and the reversioner be disseised, and the tenant for years re-enter, his re-entry will restore the seisin to the reversioner.

But if a descent cast has taken away the right of entry of the reversioner, then the entry, by the termor, will not revive the seisin to the reversioner ; but the seisin will remain in the disseisee, or his heir, or alienee (c), subject to the right of the reversioner to recover the seisin by action ; and the relation of landlord

(z) Litt. § 411.

(a) Litt. § 590.

(b) *Roe v. Elliott*, 1 Selwyn and B. 85; and see the stat. which renders attornments by tenants, void ; 11 Geo. II. c. 19. § 11.

(c) Litt. § 411.

and tenant will be suspended, until the seisin be recovered by the reversioner, or he be remitted to the same.

Therefore (*d*), if I let unto a man certain lands for the term of twenty years, and another disseiseth me, and oust the termor, and die seised, and the lands descend to his heir, I may *not enter*; because that by his entry he doth not oust the heir who is in by descent of the freehold which is descended unto him, but only claimeth to have the lands for term of years, which is no expulsion from the freehold of the heir, who is in by descent.

Had there been tenant for life, with remainder or reversion in fee, then the re-entry of the tenant for life would of necessity have restored the seisin to the owner of the remainder or reversion (*e*).

As a deduction from these principles, no man can make a feoffment of the lands, while they continue in the actual seisin of another person; and though the lands are in the possession of a tenant, and even of his own tenant, he cannot make livery of seisin without the permission and sanction of the tenant. A feoffment by a person who has a remainder or reversion after, and expectant on, an estate for life, even with the consent of the tenant for life, will be void as a feoffment, and therefore will not devest the seisin (*f*). The general practice is to turn the

(*d*) Litt. § 411.

(*e*) Litt. § 411. 416.

(*f*) *Edwards v. Rogers*, Sir W. Jones, 456.

tenant out of possession, and then to make the livery ; but it is now agreed, that the consent of the tenant for years in possession will be sufficient to enable the reversioner to make a feoffment (*g*).

It is also a rule of law, that the seisin of one *joint-tenant* is the seisin of his companion as well as of himself.

The same rule is applied to co-parceners and tenants in common. The possession of one of them is constructively the possession of all ; and hence it seems to follow, that possession or seisin of one will be the seisin of others, as against all *strangers* ; and the possession of one will constructively be held for the benefit of himself and of his companions.

To disseise his companions, there must be an actual ouster, or there must be such acts as are constructively equivalent to an ouster ; as the denial of right to the rent of any part, or the possession of any part of the land, or an exclusive possession for a long time, so as to afford the presumption of a disseisin.

In modern times the rule has been relaxed at some periods, and enlarged at other periods, in deciding on the point of ouster by one joint-tenant, tenant in common, or coparcener of his companions (*h*).

But though a stranger cannot gain an actual

(*g*) *Dyer*, 33.

(*h*) *Doe v. Prosser*, Cewp. 217; *Royston v. Reading*, 1 Salk. Rep. 242; 1 East 574; Hob. 120; 1 Rol. Abr. 668, C. pl. 2.

seisin against the owner without ousting him or his tenant (*i*), or without entering on lands which are unoccupied ; yet, in favour of the right, the person who may lawfully enter may restore his seisin by an actual entry, without turning the person in the actual seisin out of possession. Thus, if a man has disseised me, and I retain my right of entry (*k*), and enter on the land claiming the same, the seisin vests immediately in me ; and if I am again ousted, that is, denied the occupation by the person in possession, this will be a *re-disseisin* (*l*), and even change an estate-tail by defeasible title into a fee-simple by disseisin (*m*) ; but the seisin which was obtained by this entry, will be useful for many purposes, particularly to gain a seisin on which a writ of right may be maintained ; also as a seisin by way of continual claim, which will preserve the right of entry against those descents which, under other circumstances, would toll the entry.

Instances, as examples of actual disseisin, are,

1, An entry on a vacant possession, claiming the land :

2, An entry on the rightful owner, and ouster of such owner, and of his termor, if any (*n*).

3, An entry under a defective conveyance (*o*), or under a void will, or by an heir, when there is a devisee (*p*).

(*i*) Litt. § 411. (*k*) Ibid.

(*l*) Litt. § 430.

(*m*) Litt. 429. (*n*) Litt. § 411.

(*o*) 2 Rep. 55.

. (*p*) *Hulm v. Heylock*; Cro. Car. 100.

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4, An entry under the lease of a person who had no title (*q*).

5, A feoffment by a stranger, a tenant at will, for years, &c. (*r*), or for life (*s*).

For every feoffment must be founded on a rightful or wrongful possession of the land.

But an entry on land, while the owner is in possession by himself, his bailiff, or his tenant;

Or an entry to receive livery of seisin (*t*)

Or an entry at the invitation, or an entry as tenant, with the consent, or the permission, of the rightful owner (*u*);

Or the receipt of rent from my tenant, while he remains my tenant (*x*), is not an actual disseisin.

Every disseisin gains the fee, except in the special case of there being a particular estate; and an entry is made on the land, claiming that particular estate, in opposition to the owner of the particular estate (*y*).

At the same time that the law admits of this exception, the general rule is, that a man cannot qualify his own wrong (*z*).

And if a man enters claiming a particular estate, when in point of fact there is not any such estate, then the disseisin is, of necessity, of the fee; for in things *in esse* there cannot

(*q*) *Blundell v. Baugh*, Cro. Car. 302.

(*r*) 1 Inst. 330 b. 367 a.

(*s*) 1 Inst. 327 b.; even though the lessor be on the land, so as he do not oppose it; Dyer, 362, pl. 20.

(*t*) 1 Inst. 56 a. (*u*) 1 Inst. 368 a. (*x*) Litt. § 588.

(*y*) 2d vol. of Practice of Conveyancing.

(*z*) 1 Inst. 271 a.

be a particular estate without a reversion or remainder (*a*) ; and a particular estate cannot be created by claim or entry.

So if a man enter claiming to hold *at will*, he will be a disseisor, unless the rightful owner will accept the claimant as his tenant (*a a*). The language of Lord *Coke* is,

“ If a man entereth into land of his own wrong; and take the profits, his words, to hold it at the will of the owner, cannot qualify his wrong ; but he is a disseisor; and then the re-lease to him is good ; or if the owner consented thereunto, then he is a tenant at will, and that way also the re-lease is good.”

But if the right of entry be taken away, then the disseisee cannot lawfully enter on the disseisor ; the right of possession is in the disseisee ; and though the disseisee should obtain the possession, yet the disseisor may recover the possession from him by ejectment. A case of this sort was lately argued in the King’s Bench. Mr. Justice *Dampier* had, at the assizes, ruled in favour of the disseisee, but with the manly candour and liberality, for which he was so eminently distinguished, he was the first to express a doubt of the accuracy of this conclusion. The text of Littleton (*b*), had it occurred to the learned counsel, would have brought a long argument into a narrow compass.

(*a*) Litt. § 620; 576, 577.

(*aa*) 1 Inst. 271 a.

(*b*) § 486.

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Every *dispossession* is not a *disseisin*: A *disseisin* must be an ouster of the freehold. A *dispossession* may be without any ouster of the freehold. While the rightful owner is in the possession there is not any *dispossession*; because the law provides that when two persons are in possession the *seisin* or *estate* shall continue with the rightful owner.

And if a man enter on a vacant possession, and claims to hold it as bailiff, or as agent, this is no *dispossession*. The possession of the bailiff or agent is constructively the possession of the rightful owner.

The language of *Littleton* is, "also, if a man be disseised, and the disseisor dieth seised, &c. and his son and heir is in by descent, and the disseisee enter upon the heir of the disseisor, (which entry is a *disseisin*) if the heir bring an assize, or a writ of entry, in nature of an assize, he shall recover." In a writ of right he would have failed (*c*).

But if a stranger enter on a vacant possession, claiming the land as his right (*cc*); or if the younger brother enter claiming to be heir, this will be a *disseisin* to the rightful owner (*d*).

But if there be an existing term of years, and a person enter claiming the term, this entry will be a *dispossession*, and not a *disseisin*. It will be adverse to the rightful owner of the term, and not to the freeholder. The posses-

(*c*) Litt. § 487, 488.

(*cc*) *Platt's case*, 1 Rell's Abr. 659.

(*d*) Litt. § 396.

sion is consistent with the estate of the reversioner or remainder-man.

But if there had not been any such term as that which is claimed, or if the person who entered, had entered generally, he would have ousted the lessee, and disseised the reversioner or remainder-man (*d*).

And from *Perkins* (*e*), it is evident, that notwithstanding there be a lessee for years, there may, by the ouster of the lessee, be a disseisin of the freeholder.

Littleton also admits the law to be (*f*), that there may be a disseisin of the reversioner by an ouster of the termor for years under a claim of the fee.

Abatement.

ABATEMENT is a wrongful entry by a person when the possession is vacant on the death of an ancestor; so that an abatement is a disseisin of an heir at law, before he has obtained an actual seisin. It is a disseisin by the entry of a stranger, in the interval between the death of the ancestor, and an entry by the heir.

On the death of a person seised in *fee*, or in *tail*, the inheritance descends *instante* to his heir at law. The heir has immediately a seisin in law, but not a seisin in fact.

To obtain an actual seisin he must enter on the lands, or receive the rents of the tenant.

(*d*) Litt. § 411.

(*e*) § 820.

(*f*) § 411.

In the mean time he has merely a seisin in law; and a seisin in law will not enable him to maintain a writ of right, or any other writ founded on his own seisin; but let him enter even for a moment, or let him gain an actual seisin by perception of the rents and profits from his tenant, and he will obtain an actual seisin, sufficient to enable him to maintain an assise, a writ of entry sur disseisin, or even a writ of right (*g*).

While he has merely a seisin in law, and before that seisin is disturbed by abatement, the heir has a complete ownership for all the purposes of dominion and conveyance by deed or will (*h*).

A wife may be dowable of this seisin, &c. but if the marriage be after the abatement, then no title of dower will arise. And if any stranger enter before the heir has obtained an actual seisin, such entry will be an entry by abatement on the seisin of the heir. The remedy of the rightful heir will be by ejectment, founded upon the fiction of a demise, and the confession of lease, entry, and ouster; or it will be by a writ of entry sur abatement, of which there is a precedent, with a detail of the proceedings, in the case of *Smith v. Coffin* (*i*).

If a guardian hold over adversely he is an abator (*k*).

(*g*) Litt. §. 397.

(*i*) 2 Hen. Black. 444.

(*h*) Perk. § 383.

(*k*) 1 Inst. 271.

Whether an abatement may be effected by a perception of rents and profits from a termor for years, as well as by an actual entry, may be doubted. The general rule is, that the possession of the termor is the possession of him in reversion or remainder; and it may be contended, that the payment of the rent is merely a payment in the tenant's own wrong, and not a disseisin to the heir. What is to hinder the heir from distraining for the rent thus withheld from him, though wrongfully paid to another? But see p. 299.

It is to be remembered, that an entry by one of several coparceners is *prima facie* an entry for the benefit of all of them; so an entry by a remote heir is presumably an entry for the benefit of the rightful heir, and for that reason no abatement. But it is apprehended, that one of several coparceners, or a remote heir, may enter specially, and commit a disseisin; thus, a coparcener may be rightfully seised for his own share, and seised by *abatement* of the shares which he claimeth adversely (kk).

The person who enters thus wrongfully will gain a seisin.

The abater has a wrongful estate; and such estate can become rightful only by a release of the person who is the heir, or by the heir being barred of his title by non-claim on a fine, or by the statute of limitations. Such

heir must pursue his entry within twenty years, unless labouring under disabilities, or within ten years after his disabilities are removed. But he may maintain a writ of right on the actual seisin of his ancestor, at any time within sixty years; or he may maintain other remedial writs within other shorter periods; as a writ of *niel*, &c. within fifty years, a writ of entry sur abatement, &c. within thirty years on his own seisin, or within fifty years on the descent of the right from any ancestor.

The title, as derived from an abator, must be considered as defective, till it can be shown that the remedy of the heir is barred by the statute of nonclaim on fines, or the statute of limitations, or is effectually extinguished by a release of right; or that the title is established by a confirmation.

On this head the Commentaries of Mr. Justice *Blackstone* (*k*); the Commentaries of Lord *Coke*; and *Booth* on Real Actions, are the works which alone contain profound learning. Even one coparcener may be an abator to another coparcener (*l*); and a more remote heir may be an abator to a more near or immediate heir (*m*).

It should seem there may be an abatement notwithstanding the possession be in a tenant for years (*n*).

(*k*) Vol. 3. c. 10.

(*l*) Litt. § 598.

(*m*) Litt. § 396, 397, 398; 1 Inst. 242 b. 243 a. b.

(*n*) 1 Inst. 243 a.

Intrusion.

INTRUSION is a wrongful entry when the possession is vacant by the determination of a prior particular estate; or, according to Lord Coke (*o*), "Intrusion is when the ancestor died seised of any estate of inheritance expectant upon an estate for life; and then the tenant for life dieth, and between the death and the entry of the heir, an stranger doth interpose himself, and intrude." But, according to *Booth*, it is not necessary that there should have been a descent, as a foundation for an intrusion (*p*).

Intrusion takes place under the like circumstances as abatement. The only difference is, that intrusion is an entry to the prejudice of a person who has a seisin in law, in reversion or remainder, after a particular estate of freehold; while abatement is an entry on a person who has a seisin in law, merely in the character of heir.

Thus, as far as is material to these observations, an intruder is a person who on the death of a particular tenant enters, without having any right, to the prejudice of the person who has a seisin in law of the reversion or remainder.

It is a species of disseisin, and differs from a disseisin only in this circumstance, it devests a seisin in law, instead of devesting a seisin in fact.

The remedy for the reversioner or remainder-

(*o*) 1 Inst. 277.

(*p*) *Booth on Real Actions*, 181.

man is by entry, or by ejectment, which presupposes a lease, entry, and ouster; or by writ of entry sur intrusion (*q*).

An entry on the death of a testator to the prejudice of his devisee, would be merely a disseisin, or rather a *deforcement*, and not an abatement; nor would it be deemed an intrusion in the technical sense of that term. But there are distinctions on this point: for example; if *A* be tenant for life, with remainder to *B* in fee, and afterwards *B* devise to *C* in fee, and then *A* dies, and a stranger enters to the prejudice of *C*, the devisee of *B*, this would be an intrusion as against *C*; not because *C* is a devisee under *B*; but because the seisin of *A* was a seisin in law to *C*; and the entry of a stranger was by intrusion on the seisin of *C*, as expectant on a previous life estate.

In short, a devisee cannot maintain any real action grounded on the seisin of a testator; and in case such seisin was defeated or disturbed in the life-time of the testator, so as to be converted into a right of entry or of action, there would be a revocation of the will (*r*).

In the first place, a right of entry or of action is not devisable; and secondly, a devisee does not represent a testator in the same manner as an heir represents him, so as to enjoy the privity of all actions, &c. Hence the doctrine of descents which take away entry

(*q*) *Booth on Real Actions*, 181.

(*r*) *Bunker v. Cooke*, Gilb. Dev. 126; 1 Salk. 237.

does not apply to a devisee who has merely a right of entry, and cannot maintain a real action (*r*). But on this occasion, again it must be called to mind, that a devisee may have actually entered, or obtained an actual seisin, and, afterwards, for all the purposes of right or remedy, he will stand in the same situation as any other person would, by obtaining actual seisin, have stood.

When the heir enters on the title or seisin in law of the devisee, he does, in point of effect, become the disseisor of the devisee. It is a deforcement, and not an actual disseisin; neither is it an abatement or intrusion. But an entry by virtue of a will which is bad, either for forgery or any other cause, is strictly and properly an abatement, gaining a seisin from the heir at law; for the devisee is in the same situation as an actual stranger. An heir at law may levy a fine after an actual entry, so as to gain a title by nonclaim against a devisee, to whom the lands were effectually given by a will, and who neglects to enter in support of his title. So a man who enters by colour of a devise which is void, and levies a fine with proclamations (*s*), may eventually bar the rightful heir under the statutes of non-claim. It follows, that he must have gained the freehold by his entry. It is also to be

(*r*) 1 Inst. 111; 2 Schoales and Lefroy, 623.

(*s*) Supra. 292.

remembered, that in *Goodright v. Forrester* (*t*), devisees, asserting a title under a disseisee, were considered as in *loco haeredis*, so that nonclaim on a fine would run against them, though claiming under successive interests, in the same manner as it would have run against the heir; and so that five years nonclaim would bar all devisees claiming under the testator. This point assumes that a right of entry is devisable; a doctrine which is not to be easily admitted, and which is in opposition to all sound policy and all the principles of law.

In one sense an intruder is a person who intrudes on the possession of the king (*u*); and that act which as to a subject would be deemed a disseisin, is as to the king merely an intrusion; so that the king retains the seisin; for the king cannot be disseised; and as the king cannot be disseised, his tenant of a particular estate cannot be disseised.

Discontinuance.

DISCONTINUANCE is the fourth species of disseisin; it is a wrongful alienation by the owner of a particular estate of inheritance, namely, tenant in tail; who is, or at the commencement of the discontinuance (*x*), was, seised of the freehold by force of the entail (*xx*). By such discontinuance a seisin under a new title is

(*t*) 1 *Taunt.* 578.

(*u*) 1 *Inst.* 277.

(*x*) *Litt.* § 620. 629.

(*xx*) *Peck v. Channell*, *Cro. Eliz.* 827; *Litt.* § 612. 637, 638.

acquired; and, as a consequence, the seisin under the estate-tail, and the remainders, or reversion expectant on that estate, are discontinued.

Discontinuance may be defined to be the cesser of seisin under one title, by introducing a seisin under another title. Formerly a discontinuance might have been effected by persons seised in right of their church, or by husbands seised in right of their wives; and, in strictness, both these species of discontinuance still exist in law.

The statutes which have restrained alienations by husbands seised in right of their wives, have not rendered the alienations actually void; they have merely changed the remedy for redressing the injury, by giving a right of entry, in the place of a right of action.

In regard to husband and wife, a feoffment, fine, or common recovery, by a husband alone, seised in right of his wife, was a discontinuance of her estate; it converted her estate into a right of action; and put her, and her heirs, to the trouble and expense of a real action, *the cui in vita*; and consequently she was without remedy by actual entry. The statute of 32 Hen. VIII. c. 28, has restrained discontinuances by husbands seised in right of their wives, so far only that it enables the wife, or her heirs, to enter after the death of her husband, and to restore her seisin or estate by an entry without an action.

It does not abridge the estate which her

husband might have conveyed before the statute by means of a discontinuance. Now, a feoffment, fine, or common recovery by husband, seised in right of his wife, will pass tortiously and by wrong, an estate in fee-simple; and the estate of the alienee will not determine by the death of the husband, but it will continue until the wife or her heirs shall have restored the seisin by an entry. In the mean time, till entry, or a remitter, the wife or her heirs will have merely a right of entry, as distinguished from an estate, and a fine or recovery by the wife or her heir before entry, will be an extinguishment by *estoppel* of the right or title of entry; and of this *estoppel* advantage may be taken by the person who has the seisin or estate, although he be not a party to the fine or recovery (*x*).

But if the right of entry be barred by the statute of limitations, then the wife or her heirs must resort to the remedy by real action.

Discontinuance is, emphatically, applied to the tortious alienation of tenant in tail. It may be made by those persons alone who are seised of the *freehold*, by force of the entail (*y*). It cannot be made by the concurrence of a tenant for life, and of a remainderman, or reversioner in tail; nor can it be made

(*x*) *Moore's case*, *Palmer's Rep.* 365.

(*y*) Litt. § 615, 1 Inst. 332 a; *deo dem. Odiarde v. Whitehead*,
2 Burr. 704.

by a person who has an estate for life, with a remainder or reversion in tail, after an estate of freehold, between the estate of freehold, and the estate of inheritance of the tenant in tail.

Nor can it be made by a person who has an estate-tail in reversion or remainder expectant on a prior estate of freehold, or of inheritance (z).

Nor can it be made by a person who has a base fee, although this base fee be derived from the ownership of a person who had an estate-tail in possession; and hence it seems to follow, that a fine levied by a person who has a base fee, never can, in any event, operate as a bar by nonclaim; for let the authorities be properly considered (zz), and the result from them will be, that a fine will never become a bar by nonclaim, as against any person, unless the estate of that person has been previously devested or discontinued (a); or it shall be devested or discontinued by the operation of the fine. Tenant in tail, by levying a fine, may devest and discontinue a reversion or remainder (aa); hence the fine may eventually become a bar by nonclaim to the persons in reversion or remainder; but let him levy the fine under circumstances which deny him the power of devesting or discontinuing the reversion or

(z) Litt. § 615.

(zz) 10 Rep. 95.

(a) *Prodger's case*, 9 Rep. 106 a; *Edwards v. Rogers*, Sir W. Jones, 456.

(aa) 1 Inst. 332 a.

remainder, and his fine, so far from prejudicing the persons in reversion or remainder, may be used by them, and by those who have his estate, as a bar to those persons who have a title adverse to that on which the estate-tail and the reversion and remainder depend.

On the same principle, it seems to follow, that as a fine by a person who has a base fee cannot devest the reversion or remainder, the fine levied by the owner of a base fee, never can, after the determination of the base fee, be used to the prejudice of the persons in reversion or remainder, by the person who had the base fee, or any person claiming under him (*b*).

The case of a base fee is an instance in which a fine by a person may be a bar to the issue in tail, without being a bar against those who have a reversion or remainder expectant on the determination of the base fee; *ex. gr.* if *A* be tenant in tail, and make a conveyance by lease and re-lease to *B*, this conveyance would pass a base fee; and a fine levied by *B* during the continuance of the base fee, may eventually be a bar to the issue in tail of *A*, since his possession is adverse to their title; but the fine so levied never can, in any event, be a bar to the persons in reversion or remainder; since their reversion or remainder was not devested or discontinued at the date of the fine, or by its operation; but suppose the estate-tail to be

(*b*) *Focus v. Salisbury*, Hardres's Rep. 400; *Carhampton v. Carhampton*, 1 Irish Term Rep. 567.

spent, and *B* to continue in the seisin, and to levy a fine, this fine might bar the reversioner or remainder-man; since there would be a disseisin by the continuance in possession, and also a title adverse to those who had the reversion or remainder. And yet generally a mere continuance of possession after an estate is determined will not be a disseisin.

The case of a guardian holding over against the heir is another instance of disseisin by continuance of possession (*c*).

There are other cases in which a fine may operate as against one person, without affecting other persons, as in the case of *A*, tenant for life, remainder to *B* in fee. *C* by entry on *A*, and claiming his estate, would acquire that estate by disseisin, without disturbing the seisin of the reversioner or remainder-man (*d*).

The effect of a discontinuance by tenant in tail, is to pass a fee-simple under a new and wrongful title, while a mere grant or re-lease, by a tenant in tail, which does not produce the effect of a discontinuance (*e*), passes a base or determinable fee, commensurate only with the ownership, under the estate-tail; and unless this fee be enlarged by a common recovery, the estate as a base fee will determine at the same time, and under the same circumstances as it would have determined, in case it had remained an estate-tail.

(*c*) 1 Inst. 271 a.

(*d*) 1 Inst. 275, 276.

(*e*) Litt. § 613, 615.

A mere grant, a bargain and sale, or a lease and re-lease, or a covenant to stand seised, even by a tenant in tail in possession, or fine, though with proclamations, or a fine by a tenant in tail in remainder expectant on a prior estate of freehold, as distinguished from an estate for years (*f*), will not pass more than a base fee (*ff*), as has already been shown.

But a lease, re-lease, and fine, from a tenant in tail in possession, and being parts of the same assurance, will create a discontinuance (*g*).

A lease, re-lease and fine, being parts of the same assurance, are considered as a fine, and the declaration of the uses of the fine; but when a tenant in tail makes a conveyance by lease and re-lease, or bargain and sale, and afterwards, at a distinct period, and as an independent transaction, levies a fine, there will, in the first instance, be a base fee, and the fine will merely give stability to the title as against the issue; and against them, only when the fine is with proclamations, by confirming this base fee; without altering the quantity or quality of the estate, conveyed by the lease and re-lease, or bargain and sale (*h*).

From these observations, a conclusion may be drawn, that an estate-tail converted into a

(*f*) 1 Inst. 332 b.

(*ff*) See *Seymour's case*, 10 Rep. 95; and *Machel v. Clark*,
2 Raym. 778.

(*g*) *Doe dem. Odiarde v. Whithead*, 2 Burr. p. 704.

(*h*) *Seymour's case*, 10 Rep. 95.

base fee cannot be discontinued, so as to be changed into a fee-simple ; and although it be true that a base fee may be converted into an estate in fee-simple by a common recovery duly suffered by the tenant in tail, or after his death by the heir under the entail, yet such recovery does not operate by discontinuance, properly so termed ; but this change is from the peculiar operation of the common recovery, merely and simply as a bar to the reversion or remainder, by placing the title on the footing of the ownership under the estate-tail.

Indeed a common recovery, duly suffered, is rather a conveyance by tenant in tail, than a discontinuance by him.

In strict propriety, a common recovery operates as a discontinuance in those instances only in which it wrongfully displaces or devests the reversion or remainder, without effecting a bar to those estates.

Hence a condition which restrains a discontinuance is valid ; while a condition which restrains a conveyance of tenant in tail, by means of a common recovery, is repugnant to the privileges incident to the estate of tenant in tail (*i*).

A warranty may, under the circumstances already noticed, produce the effect of a discontinuance, as the means of giving effect to the warranty.

(*i*) *Pertington's case*, 10 Rep. 43 a; *Butler's Fearne*, 259, 260.

Let it be remembered too, that an intrusion on the seisin of the reversioner or remainderman has all the effects, and produces all the consequences, of a disseisin of a person actually seised, for after a disseisin, an abatement, or an intrusion, the wrongdoer obtains the actual seisin, while the rightful owner retains merely a right of entry, which may eventually be converted into a right of action, or which may be restored to an actual seisin by the means which will afterwards be noticed; and each of these three species of disseisin differs from a discontinuance by tenant in tail, only in the circumstance that a discontinuance must proceed from the owner of an estate of inheritance, so that the alienation will be good as against himself, however defective it may be as against those in reversion or remainder.

It follows, that a discontinuee, though he come into the seisin under a wrongful act, will have a right to hold the lands until the issue in tail, shall, by the death of the tenant in tail, or the persons in reversion or remainder shall, by failure of issue, acquire a complete and perfect right to avoid the discontinuance, and regain the seisin.

In the course of these observations reference has frequently been made to the different operation of the several assurances, as against tenant in tail, himself, his issue, and those in reversion or remainder.

To sum up these distinctions, and supply an

accidental omission of part of the MSS. in a former part of the work—

As to Tenant in Tail himself.

As against tenant in tail, himself, and all persons claiming under him, except his issue, (for they are considered as claiming under the statute *de donis* and *per formam doni*,) the rightful alienation, and charges of tenant in tail, will have precisely the same effect as if they were the alienations and charges of tenant in fee-simple. The tenant in tail may even be bound by estoppel, so that a conveyance may be good as against himself, though it is informal and irregular, as against his issue. Thus, if tenant in tail in remainder, after an estate for life, suffer a common recovery, without the concurrence of the tenant for life; this recovery is voidable, as against the issue, and those in remainder or reversion; but it should seem that it is good between the parties, operating as a conveyance, or by way of estoppel, so that the legal estate of tenant in tail passes to the defendant in the recovery, and the uses may arise on his seisin.

As to the Issue.

SOME acts and assurances are actually void against the issue, as a covenant to stand seised after the death of tenant in tail, judgments, and the like charges.

Other acts are voidable only, and those which

are voidable may be affirmed *quoad* the particular issue, by acceptance of rent, or by any other act by which the conveyance of tenant in tail is affirmed.

The issue may also be barred altogether, or partially, by a fine with proclamations, levied by any person to whom they are privy, *quoad* the estate-tail, or by a common recovery, or under the circumstances which have been mentioned, or by the bankruptcy of tenant in tail, and a bargain and sale by the commissioners.

In some cases also, as has already been noticed, they may be bound by warranty, and in some cases with assets, and in other cases without assets.

And they may be barred by the attainer of the tenant in tail for treason.

A common recovery is a complete bar to the entail when duly suffered: so is a fine with proclamations, which imports to pass the inheritance generally.

But a fine for years, with proclamations, or a lease for (*k*) lives, warranted by the statute of Hen. VIII. though that lease be made by livery of seisin, will bind the issue only *quoad* the term which is granted; and the reversion subject to the term, and also the rent, if any annexed to the reversion, will descend to the issue in tail.

A warranty is not a bar to the entail, but only to the person who for the time being is the issue in tail, and bound by the lien of the warranty.

Although an alienation by the tenant in tail may be voidable, in the first instance, by the issue, or those in remainder or reversion, it may eventually become good by some act by which the issue, or those in reversion or remainder, shall be eventually barred or bound, as far as they shall be so barred or bound (*k*).

As to those in Remainder or Reversion.

AN alienation of tenant in tail by deed, except a discontinuance be created, either from the nature of the assurance, as a feoffment or fine by tenant in tail, in possession (*kk*), or by reason of a warranty, is absolutely void, as against the persons in reversion and remainder : and the estate will determine, *ceteris paribus*, when the estate-tail shall determine by the death of tenant in tail, and failure of the issue inheritable to the estate-tail.

Nor has a fine any effect, as a conveyance distinguished from a discontinuance, against those in reversion or remainder ; and therefore if tenant in tail, by deed or fine, make a lease for years, or a conveyance in fee, not operating by way of discontinuance, and die, without issue inheritable to his estate-tail, the lease or estate so granted will, *ipso facto*, determine on the death of tenant in tail, and failure of his issue.

(*k*) See *Goodright v. Mead*, 3 Burr. 1703; *Stapleton v. Stapleton*, 1 Atk. 2.

(*kk*) Litt. § 559; 1 Inst. 352 b.

But a common recovery duly suffered by tenant in tail, will bar the remainders and reversions expectant on the estate-tail, and all charges and estates which are derived out of the estate in reversion and remainder (*l*).

Tortious alienations by tenants for life are not usually ranked under the doctrine of discontinuance ; and yet a feoffment, a fine, or common recovery by a tenant for life, having the immediate freehold, operates in the like mode, and produces the like effect, as is produced by a discontinuance by tenant in tail ; with the difference only, that a discontinuance renders it necessary that the seisin should be restored by action ; while, under a disseisin, discontinuance, or deforcement, by tenant for life, the seisin may be restored by entry, until the right of entry shall be taken away by a descent cast, or by a warranty, or by the statute of limitations.

Another distinction is observable between discontinuance by tenant in tail, and a discontinuance, disseisin, or deforcement by tenant for life. Every tortious alienation by a tenant for life is a breach of the feudal contract, and enables the reversioner or remainder-man to enter for a forfeiture. But no alienation by a tenant in tail, while full tenant in tail, and before there is a possibility of issue extinct, will, though tortious, give a right of entry, or of

(*l*) *Capel's case*, 1 Rep. 62 a.

(*ll*) 1 Inst. 27 b.

action, or of claim, for a forfeiture. The like observation is applicable to a base fee held under the alienation of a tenant in tail, while there is a possibility of issue under the entail.

It will be useful to collect the following propositions, as affording material information on the powers of alienation allowed by law to tenants for life; with distinctions between the effect of tortious and of rightful acts, proceeding from them by way of conveyance.

All alienations are rightful or wrongful. All rightful alienations are governed by the rule *cessante, &c.* Therefore the estate which passes by a rightful alienation cannot be of greater extent than the estate of the grantor.

Wrongful alienations are tortious, and operate by way of disseisin; hence the distinction between tortious conveyances and innocent conveyances.

Tortious conveyances operate of necessity by way of disseisin, while innocent conveyances do not occasion any wrong; and therefore, do not devest any estate, or disturb any seisin (*m*).

A tenant at will, or a tenant for years, being in possession, may, by a feoffment, give the fee to the feoffee. The fee passes by force of the livery of seisin; so a lease for life, with livery of seisin by a tenant at will, or for years, would place the freehold in the lessee; and as a necessary consequence, leave in the lessor,

though formerly only tenant at will or for years, a new reversion expectant on the estate for life. So if a stranger make a lease for years, and the lessee enter, claiming to hold for years, he will become tenant for years, and the lessor will have the fee by way of disseisin, and as a reversion expectant on the terms of years (*n*).

In the argument of *Goodright v. Forrester* (*o*), this point was mistaken.

If tenant for life make a grant by deed without livery, the estate which he has, and no greater estate, will pass; and the law prefers a less estate by right to a larger estate by wrong (*p*).

But if tenant for life having a possession make a feoffment, levy a fine, or suffer a recovery, the alienation will be wrongful, and will devest the estate of the persons in reversion and in remainder; since a wrongful fee-simple will be held under such feoffment, fine, or recovery (*pp*).

When a person is tenant for life in reversion or remainder, expectant on a prior estate of freehold, his feoffment would be a disseisin, and would pass a wrongful fee-simple; but his fine or his recovery, although it would operate as a forfeiture, would not under such circumstances disturb or devest the estate of the tenant for

(*n*) *Blundell v. Baugh*, Cro. Car, 302. (*o*) 1 *Taunt.* 578.

(*p*) 1 *Inst.* 42 a. (*pp*) 1 *Inst.* 327 b; *Litt.* § 20.

life in possession, or the estates of those in reversion or remainder.

A tenant in tail, having the immediate freehold by force of the entail, may, as has already been shown, discontinue the estate-tail, and consequently devest the estates in reversion or remainder; and a fine or recovery would, *ceteris paribus*, have the like effect.

But when the freehold is conveyed by an innocent assurance, no discontinuance will be effected; but the utmost interest which would pass would be a mere base-fee, commensurate with the ownership under the estate-tail. And a tenant in fee-simple, or of a base and determinable fee, cannot, by any means, or under any circumstances, effect a discontinuance, or, as a consequence, make a wrongful alienation.

When a discontinuance is effected, or a disseisin committed, then the grantee may have a larger estate than was ever vested in the grantor. Thus, if tenant for life, or tenant in tail in possession, make a feoffment, or even a lease for the life of the lessee, so as the same be a lease not warranted by the enabling statute of Hen. VIII. the grantee will have an estate, arising, in the first instance, by disseisin; and in the second instance, by discontinuance; and the grantor will have a new reversion expectant on this particular estate. But when circumstances will admit of it, the law will construe an estate to be rightful rather than wrongful (*q*).

(*q*) 1 Inst. 42 a; Essay on Estates, chap. Life.

The right or power of a tenant for life to disseise the persons in reversion or remainder is established by numerous authorities :

That some assurances of tenant for life do, and others do not, devest, is proved by various text books (*r*).

And some discontinue, *viz.* turn into a right of action (*s*).

And others by way of distinction only devest, *viz.* turn into a right of entry (*t*).

Hence the observation of Lord Coke (*u*), " There is a diversitie betweene an alienation working a discontinuance of an estate, which taketh away an entrie, and an alienation working, devesting, or displacing of estates, which taketh away no entry. As, if there be tenant for life, the remainder to *A* in tail, the remainder to *B* in fee, if tenant for life doth alien in fee, this doth devest and displace the remainders, but worketh no discontinuance. And therein it is to be observed, that to everie discontinuance there is necessarily a devesting or displacing of the estate, and turning the same to a right ; for if it be not turned to a right, they that have the estate cannot be driven to an action. And that is the reason, that such inheritances as lie in grant, cannot,

(*r*) Litt. § 415, 416; 1 Inst. 287 b. 330 b.

(*s*) Finch's Description of Common Law; Sheppard's Abridg. Discontinuance.

(*t*) 1 Inst. 327 b.

(*u*) Ibid.

by grant, be discontinued; because such a grant devesteth no estate, but passeth onely that which he may lawfully grant, and so the estate itself doth descend, revert, or remain."

The following points of distinction, and the authorities to which reference is made, will elucidate this useful head of the law.

1st, A mere grant or re-lease by a tenant for life will not pass more than he may rightfully grant; namely, his own estate, or some other estate determinable on his decease, though the grant may import to convey a fee (*x*).

Whenever tenant for life passes more than his life-estate, and conveys less than the fee, by livery of seisin, fine, or recovery, he gains a new reversion under the tortious alienation (*y*).

For tortious alienation necessarily destroys the former seisin, and the privity, &c. between the tenant for life and his reversioner and remainder-man, and carves out a new seisin under a new title.

A feoffment, fine, or recovery of tenant for life, is the only assurance which will devest as a conveyance; for a warranty by tenant for life never, by its own operation, produced the effect of devesting (*z*).

(*x*) Litt. § 609, 610.

(*y*) Litt. § 630; 1 Roll. Abr. § 76; Finch's Law, 135.

(*z*) 1 Inst. 251; Chudleigh's case, 1 Rep. 120; Litt. § 611, 415, 416.

2dly, A feoffment by a tenant for life will pass the fee-simple, *viz.* a greater estate than he has, even though the feoffment be by a tenant for life, who also has a remainder in tail, subject to a mesne estate between the estate for life and the remainder (*a*).

That a fine by a tenant for life having the freehold, will devest and be a discontinuance, in the sense of disseisin, of the estates in reversion and remainder, is proved by many authorities (*b*).

And a feoffment, or fine or recovery, by two successive tenants for life, will devest the inheritance (*c*).

And though one of these tenants for life had an inheritance after mesne remainders of inheritance, yet according to the ancient authorities there will be a devesting of the seisin (*d*).

In *Smith v. Clifford* (*e*), a contrary doctrine prevailed.

But a feoffment, fine or recovery, by tenant for life, and the owner of the first estate of inheritance, is a rightful conveyance (*f*).

(*a*) 1 Inst. 251; *Bredon's case*, 1 Rep. 76; *Broke's Abrid.* Discontinuance, pl. 2.

(*b*) 1 Inst. 251. 328; *Focus v. Salisbury*, Hard. 400; *Whetstone v. Whetstone*, Dyer 72 b.

(*c*) *Bredon's case*, 1 Rep. 76; Dyer 329. 334; 1 Inst. 251 b.

(*d*) *Pelham's case*, 1 Rep. 146. (*e*) 1 Term Rep. 738.

(*f*) 1 Inst. 302 a; *Bredon's case*, 1 Rep. 76.

The like observation is applicable to a common recovery.

But a person who has not the immediate freehold cannot, by fine, or any other means than a feoffment, devest the freehold ; or, as a consequence, devest the estates in reversion or remainder (*g*) ; or affect a tenant in common claiming in remainder after the estate of a prior tenant for life (*h*).

That the feoffment of a person in reversion or remainder, after an estate for life, will devest the seisin, flows from the nature and efficacy of the feoffment, and not from any power of alienation residing in the owner of the reversion or remainder (*i*).

That a feoffment, fine, or recovery, devests, is a consequence of passing a fee-simple ; or that it passes a particular estate under a wrongful alienation ; for there cannot be two fees-simple in the same land—one excludes the other (*k*).

But if tenant for life enfeoff the person who is the owner of a remainder after a *mesne* estate of inheritance, such feoffment will devest the inheritance (*l*).

And if they join in a feoffment the like effect will be produced.

(*g*) *Roe v. Elliott*, 1 Selwyn and B. 85. (*h*) *Ibid.*

(*i*) *Gallant's case in Focus v. Salisbury*, Hard. 400 ; 1 *Taunt.* 596 ; Litt. § 618 ; 1 *Inst.* 332.

(*k*) Litt. § 620 ; *Broke, Discontinuance*, pl. 64 ; *Hunt v. Bourne*, 2 *Salk.* 422.

(*l*) *Chudleigh's case*, 1 *Rep.* 140.

The alienation of tenant for life in order to devest, must be to a *stranger*, or some one not having the next or immediate estate of freehold or inheritance (*m*).

If it be to the next tenant for life, or owner of the inheritance, it will be a surrender (*n*).

When tenant for life makes a feoffment to a stranger, he gives a fee without gaining it to himself. For that reason his wife is not dowable (*o*).

But if tenant for years make a feoffment, his wife will be dowable (*p*) ; for his feoffee cannot allege that the feoffor was not seised in fee (*q*).

A quotation from *Hobart* may be added in this place as illustrative of the general doctrine, though it would, with more propriety, have found a place in a former part of this work (*r*) :

“ Of possessory things an expulsion may be
 “ made, as well as a disseisin ; and therefore if
 “ a man make a lease for years of land, and a
 “ stranger put out the lessee, he doth also dis-
 “ seise him in the reversion ; but if the lessor
 “ put him out, there is no disseisin committed,
 “ and yet the lessee hath lost his estate, and

(*m*) Litt. § 625, 626.

(*n*) Co. Litt. 41 b ; *ad finem*, 42 a ; *ad primum*; 1 Co. 76 b ;
Co. Litt. 252 a.

(*o*) 1 Roll. Abr. 676.

(*p*) Co. Litt. Hale's note, 31 b ; *Moseley v. Taylor*, Sir W. Jones, 317.

(*q*) Broke, title *Disseisor*, pl. 76.

(*r*) Hob. Rep. 322 ; *Sir W. Elvis v. Taylor and Bishop*.

“ hath but a right to it, and that whether he
“ will or no. For though it be true, that when
“ two are in possession the possession is judged
“ in him that hath right, (for he only possesseth,
“ though the other be in possession too), and
“ take away the trees, corn, or the like, yet,
“ when the true owner is clearly put out, and
“ removed, then he hath no longer estate or
“ possession, but right only, and hath no elec-
“ tion to be in possession or not in possession,
“ as that case stands, and therefore clearly he
“ cannot now grant his term ; and if the lessor
“ bring an action of debt for his rent due at
“ Michaelmas, the lessee shall plead that he
“ did enter upon him, and put him out, and
“ he continued his possession at the term, for
“ he cannot have rent out of that land that he
“ himself possesseth.. And if the lessor after
“ such expulsion dieth, the land shall descend
“ in possession to the heir, and the executor
“ shall not claim that that was a lease, for a
“ term never bears a *que* estate. But it is true
“ that there are certain cases wherein a pos-
“ session cannot be gained.”

What descents take away entries.

By the rules of the common law, a descent from a disseisor to his heir, places the heir in the seisin by the operation of law ; and the law protected this seisin for the benefit of the heir, by taking from the rightful owner the remedy of restoring the seisin by entry. This was a punishment for his laches : and as a

protection and security to the heir, the seisin could not be regained without an action. To the general rule there were the exceptions which privileged infants, married women, persons of unsound mind, and persons who were absent beyond seas at the time of the descent cast, from being precluded of their right of entry by descent. Also the entry was not taken away, when the disseisor claimed *by descent* under the same title as that which belongs to the disseisee (*s*).

As disseisins became frequent, an act of parliament was passed, to declare, that a descent *from a disseisor* should not take away the entry of the rightful owner; unless the disseisor had been in the seisin for five years before the descent was cast.

But this statute did not extend to any case, except of the disseisor himself, under an actual disseisin, on a person actually seised; for that reason, a descent from an abator, an intruder, a discontinuee, or the alienee of a disseisor, or from the heir of the disseisor, is governed by the rules of the common law, and not by the provisions of this statute (*t*); therefore seisin for any time, however short, in a person thus circumstanced, with a descent to the heir, will take away the entry of the rightful owner, and drive him to his remedy by action.

In justice, however, to persons who may enter,

(*s*) Litt. § 396, 398.

(*t*) 1 Inst. 238.

but cannot bring an action, the law has made an exception in favour of persons of this description: It follows, that a person claiming as *devisee* is not precluded from his entry, when to preclude him from his entry would be to deny him all remedy (*u*). For instance, if a man seised in fee devise by his will, and die seised, and the heir, or a stranger, enter by abatement, and die seised, this descent will not take away the entry of the devisee, or of his heir; for, as under these circumstances the devisee could not maintain any real action, the law preserves his right of entry; but had the devisee obtained an actual seisin, or even if the devise had been to one for life, with remainder over, and the devisee for life had obtained an actual seisin, and then died seised, and on his death there had been an intrusion, in each of these cases, it is apprehended, the devisee might maintain a real action, grounded, in the former case, on the seisin in fact; and in the latter case, on the seisin in law, and therefore have been beyond the pale of the law which preserves the right of entry.

The like observation applies to persons having titles under chattel interests, rights of entry for conditions broken, and by escheat, &c.

It is also to be observed, that to take away an entry, there must be a descent; in other words, the heir must take as *heir*; for a devise,

(*u*) 1 Inst. 111 a, 240 b; 2 Scholes & Lefrey 104.

or other disposition by the disseisor, will not produce the same effect as a descent; and as often as the heir is to take under a will as devisee, and not as heir, by reason that the quantity or quality of the estate, which he would have taken as heir, is changed, as in the instance of a devise to the heir in tail, or to several co-heirs as tenants in common or joint-tenants, or to the heir in fee, subject to an executory devise (*x*); the heir must be considered as devisee, and not as heir: and the privileges and protection afforded to an heir, taking as heir, will not belong to the heir taking as devisee or purchaser.

The descent must also be of an estate of inheritance either in tail or in fee; and such estate of inheritance must confer the immediate freehold (*y*); and it must be a descent to the heir, and not a transmission to successors; and therefore a descent, or *quasi* descent, to the heir as special occupant, or the transmission from a sole corporation to a successor, will not take away the entry (*z*).

Another exception to the general rule is, that a descent to the heir, who is the original disseisor, will not take away an entry, because no man shall take advantage of his own wrong.

In the case of a married woman being entitled, and the descent cast while she is under

(*x*) *Scott v. Scott*, Ambl. 383.

(*y*) Litt. § 387.

(*z*) Litt. § 413.

coverture, the descent will bind the husband during his life, though it leaves the wife and her heirs at liberty to enter (a).

When an action may be brought.

For every disseisin, an action is a concurrent remedy, with an entry, when an entry may be made; and in many cases an action may be maintained, although an entry would not be lawful.

As often as there is a discontinuance by tenant in tail, an action is the only available remedy.

At the common law, a discontinuance by a husband seised in right of his wife, would have put the wife and her heirs to their remedy by action.

And whenever the entry is tolled by descent, it is a necessary consequence, that the remedy by real action must be pursued.

When an entry may be lawfully made, an ejectment may be maintained, and, in most cases, without any previous entry.

In short, it is now agreed, that the only instance in which an actual entry is necessary, preparatory to an ejectment, is when a fine with proclamations has been levied, and such fine is grounded on an adverse seisin.

A fine at the common law, in other words, a fine without proclamations, does not render it necessary that there should be an actual entry

(a) Litt. 403, 404.

prior to an ejectment ; and if an ejectment can be brought after a fine has been levied, and before all the proclamations are made, the want of an actual entry will not be an objection against the right to maintain an ejectment (*b*).

In all cases in which an ejectment cannot be maintained, resort must be had to a real action for restoring the seisin ; and as often as there is a subsisting right, the remedy by action is a necessary consequence ; and such action must be adapted to the nature and special circumstances of the case. Under the next head, except one, there will be found a few observations applicable to the actions which are in general use at this day.

The different species are enumerated in *Booth* on Real Actions, and in *Comyn's Digest*, title Action ; but many of these actions are so rare in practice that they may be passed over without notice. At the same time some of these actions, especially the *cui in vita, sur cui in vita, writs of aiel*, &c. may, on particular occasions, deserve consideration, as the means of prosecuting an action, when an entry or ejectment is barred.

When a remitter shall restore the seisin.

Remitter is an act or operation of law.

It is applicable when a person has a right which is remediable, and the freehold, under

(*b*) *Doe v. Williams*, Cowp. 622 ; 1 Irish Term Rep. 577.

a tortious or wrongful seisin, is cast on him by act of law, or he becomes seised of the freehold without his default, or the person who has the freehold disclaims it (*c*). When there is a right of entry, as distinguished from a right of action, then there will be a remitter, when the possession, or the title to have the possession, is acquired (*d*). The principle of the doctrine of remitter is, that if the right and the seisin were in different persons, the person who had the right must prosecute that right, against the person who has the seisin of the freehold : a man cannot sue himself: and therefore he would be without remedy, as far as respected his ancient title or better right, unless the law redressed the injury, by reviving the ancient right ; and the law does, by this operation of remitter, redress the injury, by putting an end to the seisin under the tortious or wrongful ownership, and by reviving the ancient seisin under the rightful title.

A few examples will illustrate these observations.

Suppose a tenant in tail to discontinue the estate-tail, and to take back a fee to himself, this estate-tail is to be considered as the rightful estate; and it ceases by the discontinuance; and he obtains a new seisin under a new title ; and his fee is a wrongful estate.

Again; suppose him to die intestate, seised of

(*c*) Litt. § 692.

(*d*) Litt. § 695.

the fee, leaving a son, who is his general heir at law, and also the heir to the entail. On the death of the father the wrongful estate in fee-simple will descend to the son as heir. The moment the freehold vests in him, the law, (considering that he is the rightful owner, by reason of the entail, and that he cannot sue himself, and put an end to the seisin under the estate in fee, and revive the seisin under the entail,) does, by an instantaneous operation of law, avoid the wrongful estate in fee-simple, and restore the ancient and rightful estate-tail. As a consequence, the heir in tail will be discharged from all encumbrances which affected the estate in fee, but which do not affect the estate-tail.

This is only one of many instances which might be adduced ; for the learning applies to rights under estates in fee, as well as to rights under estates-tail ; and it sometimes applies when the freehold is derived by conveyance, as well as when it is derived by descent or other act of law. The better course is to consider the doctrine as general, only admitting of some exceptions, and to trace the exceptions. They will be found in *Littleton's Tenures*, chap. Remitter.

It is also to be remembered, that no remitter to an estate, turned into a right of action, can take place, unless the party obtain the *immediate freehold*, by way of estate ; nor unless his right gives him a title to the immediate

freehold; nor does the learning extend to those rights which once existed, but are become irremediable; for the sole object of the law of remitter is to give to the party the *seisin* itself, instead of leaving in him a right to recover the *seisin*.

The learning, however, embraces those cases in which there is a right of entry, as well as those in which there is a right of action (*d*). It is also extended to titles of entry, under terms for years, as well as to titles of entry under estates of freehold; for example; should a man, possessed of a term for years, be ousted by another person, the term would be in the wrong-doer, and the right or title of entry in the former proprietor; and the term could not be regained without a re-entry by the rightful owner, or by a remitter.

And while the rightful owner is out of possession he cannot grant the term, or surrender it to the rightful owner of the reversion. It is transmissible to his representatives, or it may be released to the wrong-doer.

Should the wrong-doer die while he remained the termor, and appoint the rightful owner to be his executor, or one of his executors, it seems clear, on principle, that the law would instantly revest the term in the original owner, so that he would cease to hold it as executor.

Within what time a right of entry or of action must be prosecuted.

(d) Litt. § 693, 694.

The rule of the common law was, that a right never dies; in other words, it was not barred by any lapse of time; but it was a rule of the common law, that judgment for a defendant in a writ of right was, after a year and a day, a bar against all mankind.

In process of time it was found convenient, with a view to facilitate the alienation and exchange of property, and to protect titles under which there had been enjoyment for a considerable time, to enact certain limitations which should be a bar to persons having rights, or titles of entry, and who neglected to prosecute them for a period which was deemed unreasonable.

No subject is more interesting to those who are engaged in the investigation of titles, than to understand the periods which, under the statute of limitations, convert a defeasible or defective title, into a rightful and positive title.

Of the several statutes, the statute of non-claim on fines, though not the first in date, is from the universality of its enactments, the first in importance; more especially as it affords a concurrent protection with the other statutes.

In many instances, from the shortness of the period allowed for claim against a fine, the bar may be complete under the statute of non-claim on fines, although the fine is levied after the commencement of the period which would, in process of time, and had not the fine been interposed, have barred the right.

The best course will be to give in the Appendix an abstract of the material parts of the several statutes of limitation, as they apply to remedies by entry, or by action, or as they afford protection to titles depending on assurances which are either defective, erroneous, or lost.

These statutes are ;

1st, 32 Hen. VIII. c. 2.

2dly, 1 Mar. stat. 2, c. 5 ; as to advowsons.

3dly, 21 Jas. I. c. 16.

4thly, 10 Wm. III. c. 14 ; as to recoveries.

5thly, 4 Ann. c. 16.

6thly, 9 Geo. III. c. 16 ; the *nullum tempus* act, applicable to the crown.

It will also be proper, after observing on these statutes, to notice to what extent, and in application to what cases, courts of equity have adopted rules of limitation, by analogy to the statutes of limitation.

A fine with proclamations can operate only as a bar by nonclaim, when there is an *adverse possession*. By an adverse possession must be understood an adverse title, grounded on the ouster, and, in case of freehold, on the disseisin of the rightful owner.

That a fine may operate with effect by non-claim, an estate of freehold must be in one of the parties to the fine ; otherwise the fine, and, as a consequence, the proclamations, may be avoided by a plea of *partes finis nihil habuerunt tempore finis levati*.

To illustrate the proposition, that there must

be adverse possession ; first, suppose *A* to be tenant for years or for life, with remainder to *B* for life, and a fine to be levied by *B*, while *A* remains in possession, and consequently without any ouster or disseisin of *A* ; this fine cannot, either in its inception, or eventually, prejudice *A*, since it cannot be necessary for *A* to claim an estate of which he already has the full enjoyment.

This fine, instead of barring *A*, will become a protection to his title, as being part of the same seisin or ownership as that which was the groundwork of the fine (*e*).

It is an acknowledged rule of law, that a fine with proclamations will not bar any estate or interest, except such as is devested or discontinued before the fine is levied, or by the operation of the fine (*f*). Thus a fine levied by tenant for life in possession, and operating under the authorities already noticed, to devest the reversion and remainders, may eventually become a bar to the rights of the persons in reversion or remainder, provided the discontinuance or devestment shall have taken place prior to the fine (*g*).

So if *A* be tenant for life, with remainder to *B* for life, with remainders over, and *B* enter, and disseise *A*, and levy a fine with pro-

(*e*) *Focus v. Salisbury*, Hardres's Rep. 401; *Skinner* 300; *Carhampton v. Carhampton*, 1 Irish Term Rep. 567.

(*f*) *Prodger's case*, 9 Rep. 106 a.

(*g*) *Roe v. Power*, 2 New Rep. 1; *Doe v. Williams*, Cowp. 602; 1 Irish Term Rep. 574.

clamations, this fine may operate by nonclaim as against *A*, and all persons in reversion or remainder.

The contrast of these cases must suppose *A* to be a continuing tenant for life, with remainder to *B* for life, with remainders over, and a fine with proclamations to be levied by *B*.

This fine, as it does not devest the estate of *A*, and as the continuance of seisin in *A* is a continuance of the seisin of all persons in reversion or remainder, will never, in any event, nor under any circumstance, bar the reversion or remainder (*h*).

As a person who has a base fee, that is, a fee derived out of an estate-tail, cannot discontinue the estate in remainder or reversion ; it should seem that the effect of a fine levied by him (*i*), would, as has already been more fully discussed, cease on the determination of his estate.

It cannot have any operation as against those in reversion or remainder, because these estates are not devested ; although it may operate, at least during the base fee, as against those who have adverse or conflicting titles.

In considering the bar by nonclaim on fines, it will be proper to advert briefly, and in a summary way, to the operation of the fine.

1st, As against persons who have a present right of entry or action.

(*h*) *Carhampton v. Carhampton*, 1 Ir. Term Rep. 567; 1 Inst. 298 a.

(*i*) 10 Rep. 98.

2dly, Against persons who have future rights of entry or of action.

3dly, Against persons who have future rights of entry or of action, but who labour under the disabilities of infancy, insanity, imprisonment, or absence beyond seas. A more detailed and connected view of the subject will be found in *Cruise on Fines*, and in the 2d vol. of *Practice of Conveyancing*.

1st, As against persons who have present rights of entry or of action.

All persons of this description, unless labouring under disabilities, are bound to make their entry, or bring their action within five years from the last proclamation of the fine; for as they have immediate rights, and may pursue immediate remedies, the statute of nonclaim has an incipient operation against them, as soon as the last proclamation has been made; but it must be observed, that if the same person has different estates, different remedies, or different causes of action, he is at liberty to suffer a bar to take place against him for one estate, or one cause, without being precluded, when the proper time may arrive, from asserting his title for another estate, or for another cause: for example; if *A* be tenant for life, with remainder to *B* in tail, with remainder to *A* in fee, *A* may permit a bar by nonclaim, with respect to his life-estate, and yet a title may be asserted in respect to his estate in fee at the time appointed for the commencement of this estate in possession. So

when *A* is tenant for life, with remainder to *B* in fee, and a fine is levied by *A*, and such fine either occasions a forfeiture, or is preceded by a forfeiture, the remainder-man may either elect to enter within five years for the forfeiture, or within five years after the death of *A*, in right and by reason of the remainder in fee.

Thus as to the forfeiture, the remainder-man is in the situation of a person having a present right of entry or of action ; and as to the remainder in fee, he is in the situation of a person having a future right of entry or of action.

2dly, As to persons having future rights of entry or of action.

The persons who have these rights of entry or of action, unless labouring under incapacities, must enter a claim within five years after the time at which their right of entry or of action shall be complete by the determination of the rights under the preceding estates, otherwise they will be barred.

When *A* is tenant for years, with remainder to *B* in fee, and *A* is ousted, and because the fee is, in terms or in effect, claimed, *B* is disseised ; *A* may enter immediately ; and consequently may bring his ejectment, and he will be barred by five years nonclaim.

Although *B* may immediately bring a writ of entry sur disseisin, or an assize, he cannot enter immediately, as his right to the possession will not be complete till the expiration of the term, or till the term shall be extinguished (*k*). But

(*k*) 1 Inst. 275 b.

he may make his claim, or enter at any time within five years after the expiration of the term.

So if *A* be tenant for life, with remainder to *B* for life, with remainder to *C* in tail, with remainder to *D* in tail, with remainder or reversion to *E* in fee; each of these persons in succession will have a period of five years for asserting his title; and the five years is to be computed from the time at which the prior estate, if continuing, would have determined. Thus *A* may enter within five years after the last proclamation; *B* may enter within five years after the death of *A*; *C* may enter, &c. within five years after the death of the survivor of *A* and *B*; *D* may enter, &c. within five years after the death of the survivor of *A*, *B*, and *C*, and the failure of the issue inheritable to the estate of *C*, and so on, progressively; and the entry of any one of these tenants, or judgment for him in an action, will restore the seisin to himself, and all persons entitled in reversion or remainder expectant on his estate.

3dly, Of the persons labouring under disabilities.

It is a general rule, that if the period of nonclaim once begins to run, it will continue to run, notwithstanding some subsequent disability. Therefore if a fine be levied, and duly proclaimed, and *A* has a present or future right of entry, and he is free from disabilities at any

time after he may lawfully enter or claim the possession, the fine will continue to run against him, his heirs, executors, &c. notwithstanding he may afterwards become disabled; and notwithstanding, he may die, leaving heirs, &c. who are infants, or labouring under some disability.

But if the right first accrues to a person who is at that time under a disability, the fine will not begin to run against him till he shall be free from disability; and successive disabilities, without any intermission, will continue to him a protection against being barred by non-claim: but any cessation of disability will call the statute into operative force, and no subsequent disability will arrest the bar produced by the statute.

Whether the person entitled to a present right of entry, or of action, be so entitled in respect of an estate which was immediate or future at the time of the last proclamation, such person is equally within the protection of the statute, when he labours under disability at the time when his right of entry or of action accrues; for example: if *A* be tenant for life, with remainder to *B* in tail, and a disseisin is committed by a stranger, and a fine levied, *A* must enter or claim within five years from the last proclamation, unless he be at that time under some disability; and *B* must enter or claim within five years after the death of *A*, unless he be at that time under some disability;

and each of the persons labouring under a disability must enter or claim, &c. within five years after he shall be free from such disability, or from a series of disabilities existing without any interval.

Although the ancestor may die under a disability, it is now settled, contrary to the opinion of former times, that the heir, &c. must make his claim within the period of five years (*l*) ; and it seems to be the sound and true construction of the statute of nonclaim on fines, that no one, except the person to whom the right *first* accrues, is within the protection afforded by the saving clause in the statute of nonclaim ; and consequently, if *A*, having a present right of entry or of action, dies while labouring under a disability, his heir, though labouring under a disability, must enter or claim within five years, or he will be barred by nonclaim on the fine.

Thus, successive owners under the *same* estate cannot protect themselves from asserting their claim on account of successive disabilities ; but every claim must be barred by the operation of the fine with proclamations, unless it shall be asserted during the life of the person to whom the right of entry or of action first accrues, or within five years from his death ; whatever may be the state of the rightful owner in respect of disabilities.

(*l*) *Dillon v. Leman*; 2 H. Blacks. 584.

Every entry, &c. or claim, to avoid the fine, must, under the provision of the statute of Anne (*m*), be prosecuted within one year, or it will be nugatory.

Before this salutary law was passed, an entry or claim once made, avoided the operation of the fine ; and left the party at liberty to prosecute his title, in like manner as if no fine had been levied.

In point of law, the fine was avoided, and its operation wholly and for ever defeated. Mr. Serjeant *Williams* has given an useful note on this subject.

These observations embrace that part of the learning on fines which is relevant to the point now under consideration; but these observations form a very small portion of the learning which ought to be obtained respecting the operation of fines.

The best mode of ascertaining the effect of the other statutes of limitation will be to advert to the remedies in general use, and to consider the application of the statutes as a bar to these remedies.

1st, The action of ejectment is the more general remedy, and is always adopted when circumstances allow of it. The statute of limitations of 21 James I. and the statute of nonclaim on fines, severally give a limitation to the time within which an ejectment must be brought.

(*m*) 4 & 5 Anne, c. 16.

To maintain an ejectment, there must be a right of entry, and unless the right of entry shall have been prosecuted within twenty years, except when there are disabilities; and when there are disabilities within ten years after the disabilities cease, the statute of 21 James I. will be a bar to the remedy, and the statute of nonclaim on fines may bar the right of entry in the short period of five years from the time at which the right accrues, except when there are disabilities, and in that case, within five years after the disabilities shall cease.

2dly, A formedon is a real action ; it is the writ of *right* of persons who are entitled under an entail, or claiming a remainder after an estate-tail. Formedons are divided into a formedon generally ; formedon in descender ; formedon in remainder, or revertor.

The first species of action is maintainable by the immediate donee in tail. The second species by the heir or issue of a donee in tail ; and the third species by a person who is entitled in remainder or reversion after an estate-tail.

The formedon seems to lie in those cases only in which the title *depends on the gift*, and the right is to be asserted by reason of the gift ; for when the donee in tail, or the issue, or a person in reversion or remainder, obtains an actual seisin, or even a seisin in law, by reason of the determination of a prior estate for life, continuing in the owner of that estate, is

actually disseised, he himself may maintain an assize, or a writ of entry, sur-disseisin, grounded on such actual seisin, or a writ of intrusion on such seisin in law; and the limitation to this remedy will be thirty years; but should this person be disseised after he has regained his seisin, and die, the issue claiming per *formam doni*, or the persons entitled in reversion or remainder, will, it is apprehended, be driven to their formedon.

The limitation to the several writs of formedon was fifty years, under the statute of Hen. VIII. and the period is now reduced to twenty years by the statute of 21 James I. c. 16; with an exception in favour of persons labouring under the disabilities of infancy, coverture, unsound mind, absence beyond seas, or imprisonment; so that a person who must sue his formedon will be barred, unless his action shall be brought within twenty years from the time at which his right shall accrue; or unless he shall labour under a disability; and in that case the action must be brought within twenty years after the disability shall cease; and when a fine with proclamations has been levied, nonclaim for five years, unless there has been a disability; and in case of a disability, then a nonclaim for five years after the disability has ceased, will bar the remedy, although the period of twenty years limited by the statute 21 James I. shall not be complete.

In those instances alone which concern limi-

tations to the right of actual entry, and to the remedy by formedon, and nonclaim on fines, there are exceptions in favour of persons labouring under infancy, &c. In all the other instances, the only exception which was introduced is to be found in the statute of Hen. VIII. and the exception in that statute was confined to disabilities which existed at the time of passing the statute, and of course cannot be relevant at this day.

The next species of remedy is for *intrusion*, on the death of a tenant for life (*n*), to the prejudice and disseisin of the remainder-man or reversioner; or for an abatement of the seisin of the heir whose ancestor died seised of the fee-simple.

When there is an intrusion after the death of tenant in tail, a formedon, and not a writ of intrusion, is the proper remedy; and when there is an abatement of the seisin which descends to an heir in tail, a writ of formedon, and not a writ of entry sur-abatement, must be prosecuted.

The writ of ENTRY SUR ABATEMENT must necessarily be grounded on the seisin of the ancestor; and therefore *fifty years* is the limitation within which a writ of entry sur-abatement must be brought. It does not seem to have ever been supposed, that the disseisin was to the heir, so as to bar him, unless he should bring his action within thirty years.

(n) *Booth on Real Actions*, chap. iv.

But in regard to writs of ENTRY SUR INTRUSION, thirty years, or fifty years, according to the circumstances, is understood to be the period of limitation ; but no authority has been found which can be considered to bear on this point, and render it clear.

The distinctions which present themselves are,

1st, The writ of intrusion must be prosecuted by the person originally disseised, within thirty years ; and should thirty years run against him, before he had regained his seisin, he and his heirs would be barred of all remedy. But should he die within thirty years, the right would become *ancestrel*, and the heir would be allowed to maintain his writ of intrusion at any time before the expiration of fifty years from the original disseisin.

The period of limitation to a *writ of right* is generally supposed to be sixty years. But the statute makes a difference in its limitation, when the disseisin is committed against the demandant himself ; and when it is committed against an ancestor.

The demandant will be barred in case he was disseised, and has not brought his writ of right within thirty years ; and should thirty years elapse against the disseisee, and he should be barred, it would follow on principle, that a bar to him would be a bar to all his heirs. But should the disseissee die before the thirty years are expired, the remedy of the heir would be

ancestrel; and the heir might bring his writ of right at any time within sixty years, from the time of taking the *esplees*, viz. the profits in kind, or in rent.

A bar to a writ of right, or rather a judgment in a writ of right, is conclusive on all other remedies; since this is a remedy of the highest nature, and puts the title on the footing of the mere right. But a bar to an inferior writ, or an inferior remedy, is no bar to the superior remedy by a writ of right. And whenever circumstances will admit, the claimant should try his title by every other means, before he resorts to the remedy by writ of right (o).

It must be always borne in mind, that a fine with proclamations, levied during the pendency of the limited period of sixty years, or of thirty years, may be a bar to the right, and to the remedy by writ of right, by reason of the nonclaim for five years against a person who is not protected by the savings in the statute of nonclaim. The like observation applies to all the other remedies by real action. Therefore, as often as a fine with proclamations occurs in a title which is to be protected against a claimant, or against a defect in the mode of deducing the title, the more safe, and the more easy course, is to consider whether a bar has

(o) *William's Notes to Saunders, and Booth on Real Actions*, 84.

not been produced by the statute of nonclaim on fines, before resort is had to the other statutes of limitation.

On the other hand, it must also be remembered, that there are saving clauses in the statute of nonclaim on fines, while there is not any saving cause relevant to modern claims in the statute 32 Hen. VIII. c. 2.

It may sometimes happen, that a fine with proclamations has been levied, and no bar effected by force of the fine, and yet a bar may have been effected under the other statutes of limitation, even while the claimant, or person having title, was protected from the bar of the statute of nonclaim on fines. For example: if a man should be disseised, and twenty-five years should run against him, and then he should become lunatic, or under any other disability, and a fine with proclamations should be levied by the disseisor, or person claiming under him, and afterwards five years should run, while the person so entitled, should labour under a disability; in these circumstances, the fine would, by reason of disability, be inoperative to bar the title, and yet a bar would be effected under the statute of Hen. VIII.; since that statute makes no allowance for disabilities, and therefore continues to run against the person who has the right.

The like observation is applicable to all other instances which can occur under the statute of Hen. VIII.

The statute of 21 James I. contains exceptions in favour of persons under disabilities. But it may happen that a person is excluded from the benefit of the exceptions in the statute of 21 James I. although under different circumstances he might have been protected by the saving clauses in the statute of nonclaim on fines: for instance; the twenty years may have begun to run, and be nearly complete, and then a fine may be levied. A disability existing at that time, would prevent the application of the bar by the statute of nonclaim on fines; and yet the bar under the statute of 21 James I. would be complete at the end of the twenty years.

These observations lead to another conclusion: When there are *different rights*, and different remedies, a fine may be inefficient to bar one right or one remedy, and yet it may become efficient to bar another right or remedy.

For instance, if a man should be disseised, he may either bring his ejectment within twenty years, his writ of entry within thirty years, or his writ of right within the same period. A fine may be levied by the disseisor, and the operation of that fine may be suspended, as against the right of entry, and consequently against the ejectment, by reason of infancy, &c. and yet the fine may eventually become a bar to the remedy by assize, or by writ of entry, or by writ of right, on the ground that all disabilities have ceased, so as to allow the period of nonclaim to run.

The bar against the real action may also be complete under the statute of Hen. VIII. before the bar against the ejectment or right of entry will be complete under the statute of 21 James I. For example: should a disseisin be committed against a person who is a lunatic, an infant, &c. and he should live for thirty years or more under the same, or a successive disability, the thirty years would be a bar to the remedy by assize, writ of entry, or writ of right; and yet by reason of the saving in the statute of James, an ejectment might be maintained; and the consequence of success in an ejectment, or even of an entry to revest the seisin, would be to establish a title in the rightful owner.

These deductions are drawn from the language, and from the probable construction, of these statutes; and it is possible that many of these points may be questionable, and even erroneous; for it may be contended, when the right is barred by the statute of limitations of Hen. VIII. the right of entry is barred as a consequence.

It has sometimes been said, and Mr. J. *Blackstone* (p) has favoured that conclusion, that a possession for sixty years, under an undisturbed title, gives a good title against all mankind.

This is true only when a disseisin has been committed against a person, who solely and alone was the absolute owner of the fee simple; or as against several persons who were owners

(p) See 1 Vol. of Abstracts p. 250.

of the fee simple, as tenants in common, joint-tenants, or tenants by entireties.

In considering the nature of the different remedies, adapted to different circumstances, it will be obvious that there are many cases to which the period of limitation of sixty years has no application.

In all cases of particular estates, with remainders or reversions expectant on them, the right of entry, or the right of action, arises only from the period of the determination of the prior estate; and the period of computation, under the statute of limitations, begins to run from the period of the regular determination of the prior estate.

Therefore when there is a disseisin of a person who was tenant for life, or an ouster of a tenant for years, and a disseisin of the freeholder; and there were successive estates for life, in tail or in fee, it is well ascertained that each succeeding tenant will be entitled to make his entry, or to bring his action, within twenty years from the time when his right accrues; that is, from the time at which he would have had a right to the possession, in case the seisin under which he became entitled, had not been disturbed.

The general principle, and the effect of the statutes of limitation, is to arrange claimants into different classes; namely, as entitled to the whole fee simple as taken from them by disseisin, or entitled to particular estates, or to

the reversion or remainder in fee expectant on a prior particular estate.

The writ of right is in general founded on a seisin of the fee-simple ; conferring the right to the immediate freehold. But it may be maintained by a person who, by himself or a jointenant (*q*), was seised of the freehold under one estate, and of the inheritance under another estate (*r*) ; but then the inheritance must, it is apprehended, have been expectant on an estate merely of freehold, and not of inheritance, and seisin of the freehold by wrong (*s*) ; or by a title which is defeated by a better title (*t*), will be sufficient to maintain the writ.

The writ of entry sur abatement must also be grounded on a seisin in law of the fee ; but the writ of entry sur intrusion may be founded either on a seisin in fee, or a seisin for life, but not on a seisin in tail (*u*). It must also be grounded on an intrusion, after the death of a person who was merely a tenant for life, and not after the death of a tenant in tail (*x*) ; or even of a tenant in tail after possibility of issue extinct (*y*).

The writ of ENTRY SUR DISSEISIN, or writ of assize, must, by the common law, be grounded on an *actual* seisin of an inheritance, either in fee or in tail, or of the actual freehold for life (*z*).

- (q)* 1 Inst. 281. *(r)* Ibid. *(s)* Litt. § 482.
- (t)* 1 Inst. 281 a. *(u)* Booth on Real Actions, chap. iv.
- (x)* F. N. B. 509, 8 Rep. 172 b; Booth on real Actions, 185.
- (y)* Bowle's case, 11 Rep. 80.
- (z)* Booth, 177, 210. 263.

With these different circumstances end the periods of limitation for sixty years, fifty * years, and thirty years.

The only other period is of twenty years, and it is designed for persons who cannot maintain either a writ of right or a writ of entry.

These are,

1st, Devisees who never were seised by themselves or others, and therefore have no other remedy than by ejectment.

2dly, Persons who claim by force of the gift in tail, and therefore must bring a formedon or an ejectment.

And lastly, Persons who have merely a right of entry for a condition broken, &c. or who choose to prosecute a remedy by entry, in preference to a real action.

All rights to make an entry must be prosecuted within twenty years after the right of entry accrues, unless there be disabilities, and then within ten years after the disabilities shall cease. Thus persons who have a present right of entry must enter within twenty years, unless labouring under some disability; and then within ten years after the disability shall cease; and persons who have future rights of entry, must enter within twenty years after these rights shall be complete, unless they can claim the protection and benefit of the saving in the statute of limitations, and then within ten years after they shall be free from disabilities.

* In some books misprinted, *forty*.

But it is to be observed, that though more than ten years shall have run after the disabilities shall have ceased, there will not be any bar until the original twenty years are also complete; and it is always to be remembered, that the period of limitation may be restricted and brought into a narrower compass, by the operation of a fine with proclamations, and the statutes of nonclaim on fines. As the statutes of limitation operate in the mode of barring the remedy, a bar to an ejectment will not necessarily be a bar to a writ of entry, or the like remedy.

To consider the several divisions under which this head has been classed.

FIRST, Devisees, as such and by force of the gift, have no other remedy than by entry. For want of seisin they cannot prosecute a real action (*a*). This observation must be confined to devisees, *quasi* devisees; for after they have obtained a seisin, they are, as already noticed, in the same predicament with other persons who have been in the seisin; and may maintain a writ of right, a writ of entry, or the like action, in the same manner as if they had been feoffees, grantees, &c. and seisin had been delivered to them, or those connected with them in privity.

Thus, when a gift is made *by will* to one for life, with remainders over, the seisin of the tenant for life is a seisin to those in remainder, to enable them to maintain a writ of entry, &c.

(*a*) 1 Inst. 111; 2 Scholes and Lefroy, 104.

The only other class of persons who may enter, but cannot bring an action, are;

1st, Persons who have a right or title of entry for a condition broken.

2dly, Persons who have a right or title of entry under particular statutes ; as the statutes of *mortmain*, &c. ; and,

3dly, Persons who have a right or title of entry by reason of a chattel interest ; as, till debts shall be paid, or to levy the arrears of an annuity, as in *Jemmott v. Cooley* (*b*), or by reason of a term converted into a right of entry.

SECONDLY, A donee in tail by will, after he has obtained a *seisin* by himself, or by the owner of a particular estate, may, in the former case, maintain a writ of entry ; and in the latter case, maintain a *formedon*. In the mean time, an entry, or an ejectment, which pre-supposes a right of entry, is the only available remedy.

THIRDLY, Persons of this class are, in effect, already considered.

In general a real action may be maintained whenever an ejectment will lie. The exceptions, or the greater part of them, have already been noticed. The converse of the rule, however, is not true. Sometimes, as in the case of a discontinuance, the rightful owner may have a remedy by *formedon*, although he is precluded by the effect of the discontinuance from the remedy by ejectment. In other cases, as when there is a descent which has tolled the entry,

(*b*) Raym. Rep. 135; 1 Lev. 170.

a man may be barred of his remedy by entry, and consequently of ejectment, and yet be at liberty to prosecute a real action; for, although the remedy by ejectment is barred by the statute of limitations, by reason that twenty years have elapsed, &c. none of the statutes of limitation may have barred the remedy by real action: for example; a man is disseised, and twenty years have run; the twenty years are a bar to his ejectment; but a writ of entry sur disseisin, or a writ of right, will lie for him within thirty years.

Again; *A* dies seised, leaving *B* his heir at law; and *B* is disseised by the abatement of *C*; and twenty years elapse; *B* is driven to his writ of entry sur abatement; inasmuch as he is barred of his remedy by entry or ejectment.

The like observation applies to an intrusion: and when the disseisee dies before he is totally barred by the statute of limitations, then, as sixty years are the limited period for barring the right under the seisin of the ancestor; and as fifty years are the period for barring the remedy sur abatement, or sur intrusion, the heir who may be barred of the remedy by ejectment or entry, will necessarily be driven to the writ of right, or to the writ of entry sur abatement, or to the writ of entry sur intrusion, or to the writ of entry sur disseisin; as one or the other writ shall be adapted to his case, so as to enable him to avoid the bar of the statutes of limitation.

A few general observations may be offered, and they will be equally relevant to the several statutes of limitation.

1st, Although joint-tenants and coparceners have a seisin *per my et per tout*, yet it is agreed, that when there is a disseisin of both, one of them may be barred by the statute of limitations, although the statute shall not have effect as a bar to the other of them (*c*).

From the nature of things, however, this can happen, only in cases falling within the exceptions of the statutes of nonclaim on fines, and the statute of 21 James I.

As between strangers, and one of several joint-tenants, &c. the continuance of seisin in one joint-tenant, or tenant in common, or coparcener, is a continuance of the seisin in all.

But one joint-tenant, tenant in common, or coparcener, may, by an actual ouster, exclude his companion from the seisin, and gain a title by nonclaim on a fine, or by the statute of limitations; and by an actual ouster, which may now be understood any act which denies the title of the co-tenant, may disseise his companion, so that the statute of limitations may begin to run (*d*).

2dly, The statutes never run against a man while he continues in the seisin; and therefore a man must be ousted of his term, or disseised

(c) *Roe v. Rowston*, 2 Taunt. 441.

(d) *Supra*.

of his freehold, before the statute of limitations will have any operation against him.

In modern phraseology this is called *adverse possession*; and by adverse possession must be understood, as far as respects estates of freehold, a seisin under a wrongful estate.

In what cases, and to what extent, courts of equity admit the application of the analogy of the statutes of limitation.

The first and most prominent rule is, that nonclaim on a fine by a mortgagor, or by a mortgagee, will not bar the other of these parties (*d*).

3dly, A fine by a trustee will not bar his *cestui que trust*; and a fine of *cestui que trust*, while he holds as such, will not bar his trustee.

But as between a mortgagor and a mortgagee, the equity of redemption of the mortgagor may be barred by the lapse of twenty years; and in case of disabilities, then of ten years after the disabilities cease, without any recognition of his title to redeem.

The cases on this point, with their qualifications and exceptions, are stated in *Powell on Mortgages* (*e*).

The rule is adopted in analogy to the time allowed for prosecuting a right of entry under the statute of 21 James I. c. 16 (*f*).

(*d*) *Powell on Mortgages* 219, 282.

(*e*) 408, *Hoole v. Healy*, 1 Ves. and Beames 540.

(*f*) 1 Ves. and Beames 539.

In *Clay v. Smith* (*g*), Lord Keeper Henley observed ;

“ 1st, What is the length of time to bar a bill of review ?

“ 2dly, From what period the time is to be computed ?

“ To the first : twenty years is the proper period. *Edwards v. Carrol* settled this point.

“ Nothing can demand the assistance of the court but conscience and reasonable diligence; *laches* and neglect are discountenanced here ; and therefore it was necessary to introduce a limitation.

“ Lord North says right, viz. “ that there is no settled limitation to a bill of review ; yet after twenty years I will not reverse, but for very apparent error. As the court had not legislative power, the court could not limit the time ; but as soon as the parliament had limited the time of bringing actions at law, courts of equity adopted the rule, and applied the parliamentary rule to equitable cases. Twenty years is fixed by 10 William III. to bring error of fine or recovery.”

In *Davie v. Beardsham* (*h*), the defendant could not obtain relief, as devisee of copyhold lands, which had descended to the customary heir, subject to a trust created by the will, because twenty years adverse title, not merely possession, (for the devisee had held the possession a tenant,) had run as between the heir

(*g*) Ambl. 647; 3 Bro. C. C. 640. (*h*) 1 Ch. C. 39.

and the devisee, though the heir was constructively a trustee for the devisee.

In this case *Davie* agreed for the purchase of certain copyhold lands, which were surrendered out of court to his use. Before admittance he died, having copyholds, and having made his will after the said contract, and thereby devised to the plaintiff (who was then, and at his death, his visible heir) all his copyholds; after his death, his wife being *privement enseint* at his death, was delivered of the defendant's wife, who then became the heir of the devisor.

The plaintiff taking it for granted that the copyholds so contracted for did not pass by the will, suffered the heir to be admitted, and held the same of the heir for twenty years, and paid her rent for that time.

Afterwards the plaintiff exhibited his bill to have those copyhold lands decreed to him. And it was, on the hearing, declared by the court, that it was clear the said copyholds so agreed for did pass by the will to the plaintiff, for that the purchaser had an equity to recover the land; and the vendor stood trusted for the purchaser, and as he should appoint, till a conveyance executed. It was ruled, that if upon articles for a purchase, the purchaser dieth, and deviseth the land before the conveyance executed, the land passeth in equity; but inasmuch as the plaintiff had admitted the title to be in the heir, and paid her rent, and agreed so to do, the court should not decree it, but

declared, if the plaintiff *had come in time*, it was proper to be decreed.

Thus twenty years was a bar to the equity of the devisee.

In Earl *Cholmondeley* and *Damer* v. Lord *Clinton* (*i*), his honour the late Master of the Rolls, on that head of argument for Lord *Clinton*, which relied on the possession of himself and his father for twenty years and upwards, as owners, subject to an existing mortgage, observed,

“ It seems to me that there is no room in this case for the operation of the statute of limitations.

“ There is a possession of twenty years ; but *not in the character of owner of the legal estate*, nor under any claim of being so entitled. The subsistence of the mortgage has been all along recognised, and nothing but the equity of redemption was ever claimed by Lord *Clinton*. Even at law, it is not mere possession that is sufficient to bar the claim of the true owner. There must be something tantamount to a disseisin. Now though there may be what is deemed a seisin of an equitable estate, there can be no disseisin of it ; first, because the disseisin must be of the entire estate, and not of a limited and partial interest in it; the equitable ownership cannot possibly be the subject of disseisin ; and secondly, because a tortious act can never be the foundation of an equitable title.

(*i*) *Merrivale*, 357.

" In the case of *Hopkins v. Hopkins* (*l*), Lord *Hardwicke*, speaking of the analogy between uses and trusts, says, " it is very true this would " not have been endured if courts of equity " had not in general allowed these trust-estates " to have the same consideration in point of " policy with legal estates, and given the same " power to *cestui que* trusts with respect to alien- " ations, as if it was an use executed. There- " fore a tenant in tail of a trust may bar his " issue by a fine ; a tenant in tail of a trust, " remainder over, may dock the remainder by " a common recovery ; nay, some go so far " as to say he may do it by feoffment only. " But all these are common assurances, and " rightful methods of conveying estates ; for " it was never allowed that in trust-estates, a " like estate may be gained by wrong, as there " might be of a legal estate ; therefore, on a " trust in equity, no estate can be gained by " disseisin, abatement, or intrusion. It is true it " may happen so upon a trustee, and in con- " sequence the *cestui que* trust may be affected, " but that is on account of binding the legal " estate ; but on a bare trust no estate can be " gained by disseisin, abatement, or intrusion, " while the trust continues."

" If George Earl of Orford had died seised of the legal fee, the late Lord *Clinton*, who entered on his death, would have gained an

estate by abatement, which could only be defeated, in the first instance, by entry; and after a descent cast, by action. And after twenty years continuance of the possession, no ejectment could have been maintained.

" But equity does not acknowledge that Lord *Clinton*, by entering without title, gained any equitable interest in the estate, and the legal interest he does not profess to have acquired. An equitable title may, undoubtedly, be barred by length of time, but it cannot be shifted or transferred. What was once my equity, may, by my *laches*, be wholly extinguished; but it cannot, without my act, become the equity of another person. It does not therefore follow that an equity can be acquired by length of possession, because by length of possession it may be barred. Here it is admitted that the equity of redemption subsists; and so long as it subsists, the question to whom it belongs, must remain open. Somebody is entitled to redeem, and to have a conveyance of the legal estate. To whom is the court to direct the conveyance to be made? to him who shows a title? or to him who has nothing to show, but a possession of twenty years? If to the latter, then a twenty years possession must constitute, not merely a bar, but a positive title to an equitable estate. Lord *Hardwicke's* position would no longer be true, for disseisin, abatement, or intrusion, would be available modes of acquiring equitable estates.

"It will not be disputed that an equity of redemption, is an equitable right, for it is only in equity, that after forfeiture it has an existence; and although the equitable ownership be in the mortgagor, yet his possession is of a more precarious nature than that of any other *cestui que* trust. In general a trustee is not allowed to deprive his *cestui que* trust of the possession; but a mortgagee may assume the possession whenever he pleases; and therefore a mortgagor is called tenant at will to the mortgagee, and, in point of possession, he is so even in equity; for a court of equity never interferes to prevent the mortgagee from assuming the possession. It cannot be said, therefore, that Lord *Clinton*, who acknowledged the title of the mortgagee, has had any other than a precarious and permissive possession, which would be insufficient for the acquisition of a right, even supposing that by any possession an equitable right could be acquired. By the civil law, prescription can only run in favour of him "*qui, neque vi, neque clam, neque precario, possidet.*" A permissive possession, however long it might, in point of fact, have endured, could never ripen into a title against any body, for it was not considered as the possession of the precarious occupier, but of him upon whose pleasure its continuance depended.

"Lord *Hardwicke* somewhere says, that a *cestui que* trust may dispossess his trustee, and gain the legal estate. Doubtless the legal estate

may be gained by disseisin. The *cestui que* trust may have a substantive independent possession ; but a mortgagor never can disseise his mortgagee * ; why ? because his possession is not properly his own, but that of the mortgagee. In *Harmood v. Oglander* (*n*), it was considered as doubtful whether the trust continued to subsist, or whether the long possession had not disseised the trustee himself ; but it was conceived by Lord *Alvanley*, first, and afterwards by the present Lord Chancellor, that if it subsisted, *and if the trustee could recover as having the legal estate*, it would follow that the right of one of the *cestui que* trusts could not be barred by the length of time during which he had been out of possession. On that principle Lord *Macclesfield*, in the case of *Lawley v. Lawley* (*o*), over-ruled the plea of the statute of limitations, on the ground that the legal estate was in trustees.

“ There, in a marriage settlement, one of the trusts was, if the wife survived, to pay to her the rents and profits of certain lands, as the same were at that time let. The husband during his life greatly increased the rents of the estate ; and upon his death the wife enjoyed the whole of the rents, making no distinction between the original and the additional

* This proposition is too general. A feoffment would be a legal disseisin.

rent. About *fourteen years* after her death, the heir at law filed a bill for the purpose of recovering the surplus rents. The statute of limitations was pleaded, and on the ground I have stated, that the estate was in trustees; Lord *Macclesfield* disallowed the plea. Now it is perfectly clear, that under any other circumstances the demand for those rents would have been barred; but it was conceived, that so long as the trust subsisted, so long it was impossible that the *cestui que* trust could be barred. *The cestui que trusts could only be barred by barring and excluding the estate of the trustee.* In the present case the trust subsists. The mortgagee is trustee of the legal estate for the person who has the equity of redemption. And I am of opinion that the person who has the equity of redemption is the plaintiff, Mrs. *Damer*, as the devisee of Horace Earl of *Orford*. For as there could be no disseisin of an equitable estate, there was nothing to prevent him from devising this interest; and the general words of his will are sufficient to include it.

“ But against that judgment there will probably be an appeal, should the opinion of the court of King’s Bench, on the legal question, render an appeal necessary.”

And unless the analogy be applicable, as between two persons having conflicting rights in equity, respecting the equitable ownership, the operation of the rule would be very limited.

And in *Llewellyn v. Mackworth* (*p*), the defendant's counsel insisted that the plaintiff was barred by the statute of limitations. In answer, it was said, that this is a trust which the plaintiff claims; and, therefore, that the statute of limitations did not extend to this case. But Lord *Hardwicke*'s opinion was, that that was not a sufficient answer, for that rule only holds *between cestui que trust and trustee*; but does not extend to the case of a stranger, for a stranger is equally obliged to claim the benefit of a trust within the time appointed by the statute, in case of a trust estate, as if it had been a legal estate.

There is, he added, hardly any ancient family but there are long terms in the hands of trustees; and if strangers might be allowed to lay claim to them, after any length of time, it might be greatly inconvenient; and as it is a stranger that claims the benefit of this trust in the present case, the length of time must be a bar.

In *Llewellyn v. Mackworth*, the legal estate was in a trustee, and the contest was between several persons claiming the benefit of the trust.

So in *Basket v. Pierce* (*q*), the Lord *Keeper* was of opinion, that the fine of a *cestui que* trust in tail and nonclaim would bar the equitable remainder-man in tail; for equitable rights are

as well to be bound by fine as actions and titles at law: and though he suffered the plaintiff to bring an action in the name of his trustee, he declared his opinion to be, that the plaintiff was barred.

But in *Hopkins v. Hopkins* (*r*), in *the year 1738*, while *Llewellyn v. Mackworth* was in *1742*, the language of Lord Hardwicke was very different from that which he subsequently held in *Llewellyn v. Mackworth*, and seems to be a correction of his own doctrine advanced in that case; for he said, “it was never allowed, that in trust-estates a like estate may be gained by wrong, as there might be of a legal estate; therefore, on a trust in equity, no estate can be gained by disseisin, abatement, or intrusion. It is true, it may happen so upon a trustee, and in consequence the *cestui que* trust may be affected, but that is on account of binding the legal estate; but on a bare trust no estate can be gained by disseisin, abatement, or intrusion, whilst the trust continues.”

In *Bond v. Hopkins* (*s*), Lord Redesdale’s language was, “the statute of limitations does not apply in terms to proceedings in courts of equity; it applies to particular actions at common law, and limits the time within which they shall be brought according to the nature of these actions; but it does not say there shall be no recovery in any other mode of proceeding.

(*r*) 1 Atk. 591.

(*s*) 2 Scholes and Lefroy, 428.

The first part of the preamble applies to particular writs ; the second part to quiet possessions, and the enactment proceeds on the first only. At the time of passing that act in this country, [Ireland] suits in equity were very common ; and the manner in which courts of equity had considered the statute of limitations in England was well understood. Therefore this act must be considered as having passed with full knowledge on the part of the legislature of the construction put upon a similar statute in England, in proceedings in courts of equity ; and that courts of equity would not probably be considered as affected by it, otherwise than as courts had been considered as affected by the English act, that is, it would be considered as affecting equitable titles, and equitable titles by analogy to it.

“ There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles ; courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases as they arise, by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles ; but the principles are as fixed and certain as the principles on which the courts of common law proceed.

“ Nothing is better established in courts of equity, (and it was established long before this

act) than that where a title exists at law, and in conscience, and the effectual assertion of it at law is unconscientiously obstructed, relief should be given in equity; and that where a title exists in conscience, though there be none at law, relief should also, though in a different mode, be given in equity. Both these cases are considered by courts of equity as affected by the statute of limitations; that is, if the equitable title be not sued upon within the time within which a legal title of the same nature ought to be sued upon, to prevent the bar created by the statute, the court, acting by analogy to the statute, will not relieve. If the party be guilty of such *laches* in prosecuting his equitable title, as would bar him if his title were solely at law, he shall be barred in equity; but that is all the operation this statute has or ought to have, on proceedings in equity; and the statute having been made in this country, after these principles had been fully established by the decisions of the courts of equity in England, on the statute of limitations made in that country, it must have been the intent of the legislature here to leave it open to courts of equity, guided by their established principles, to determine how far the statute should be applied to their proceedings. If a court of equity goes beyond the line which it ought to adopt as its limit, there is a court of last resort which may correct its errors: if that court should act, so as to alter, instead of declaring

the law, the legislature may interfere ; but if the court of last resort decides, and the legislature acquiesces, the law must be taken to be according to the decision."

And in *Meldicot v. O'Donel* (*t*), Lord *Manners* said, "Can the court give relief to a person sleeping on his rights for twenty-seven years? " Can this court listen to the case, and interpose its relief? I think it utterly impossible. " The court will stand neuter ; and say, length of time and acquiescence have deprived you of relief. It has been suggested," he added, " that I lay too much stress upon length of time; and I attach more credit to it, than Lord *Redesdale*, or any of my predecessors have done. I confess I think the statute of limitations is founded upon the soundest principle and the wisest policy ; and that this court, for the peace of families, and to quiet titles, is bound to adopt it in cases where the equitable and legal title so far correspond, " that the only difference between them is, " that the one may be enforced in this court, " and the other in a court of law."

And his lordship, after noticing the observation of Lord *Camden* in *Smith v. Clay* (*u*), observed, " now, I think that Lord *Camden* has put it, that he will consider an equitable right barred in the same manner as a legal title would be in a possessory action at law."

(*t*) 1 *Bail and Beatty*, 156.

(*u*) 3 *Blo. C. C.* 639.

"And in cases of fraud where the facts constituting the fraud are known, where there is no subsisting trust or continuing influence, the same principle will apply (*u*). In the case of *Hovenden v. Lord Annesley* (*x*), decided by Lord *Redesdale*, and in the cases there referred to, this principle is laid down, that if the equitable title is not acted upon in the same time the legal title should, it is barred. And in *Bond v. Hopkins* (*y*), Lord *Redesdale* lays down the same doctrine. And I would refer also to the case of *Bonny v. Ridgard* (*z*), cited, *Andrew v. Shrigley* (*a*), *Townshend v. Townshend* (*b*), where the same principle is recognized and acted upon (*c*).

"I think then I stand well supported by principle and authority, in saying that this court is bound to regulate its proceedings by analogy, or in obedience, to the statute of limitations."

Also in *Burke v. Crosbie* (*d*), Lord *Manners* observed, "it is admitted, that length of time may be a bar to an equitable title; and that a married woman is bound by a decree to which she and her husband were parties."

He proceeded in another part of the judgment (*e*), to observe, a "court of equity is not to impeach a transaction on the ground of

(*u*) 1 Schoales & Lefroy 414. (*x*) 2 Schoales & Lefroy, 607.

(*y*) 1 Schoales & Lefroy, 428. (*z*) 4 Bro. C. C. 138.

(*a*) 4 Bro. C. C. 125. (*b*) 1 Bro. C. C. 550.

(*c*) See *Beckford v. Wade*, 17 Ves. jun. 87.

(*d*) 1 Ball and Beatty, 503. (*e*) p. 636.

fraud, where the fact of the alleged fraud was within the knowledge of the party sixty years before. On the contrary, I think the rule has been so laid down, that every new right of action in equity that accrues to the party, whatever it may be, must be *acted upon at the utmost within twenty years*. Thus, in the case of redemption of a mortgage, if the mortgagee has been in possession for a great length of time, but has acknowledged that his possession was as mortgagee, and therefore liable to redemption, a right of action accrues upon that acknowledgment. But if not pursued within twenty years, it is like the case at law of a promise of payment beyond the six years, and *non assumpsit infra sex annos* pleaded; and so in every case of equitable title (*not being the case of a trustee whose possession is consistent with the title of the claimant*,) it must be pursued within twenty years after the title accrues. This was so considered by Lord Camden, in *Smith v. Clay*, referring to *Jenner v. Tracy (f)*, that the same length of time should bar a redemption that would bar any other equity. In *Floyer v. Lavington (g)*, it is laid down by Sir Joseph Jekyll, that *as the statute of limitations had, in the case of lands after twenty years possession, barred the plaintiff of his entry or ejectment, so the court of equity, in imitation of that law, would not allow the mortgagor to redeem the*

(f) 3 P. Wms. 287, note B.

(g) 1 P. Wms. 270.

mortgage after the mortgagee had been twenty years in possession. It seems to me, therefore, that the statute of limitations would of itself be a complete bar to the relief sought on this bill, as it is impossible that any new right of action could have accrued since 1735."

In *Hovenden v. Lord Annesley* (*h*), Lord Redesdale said, "I have looked at a great number of cases (*i*) for the purpose of seeing how far this rule has been adopted at different times; and I think it is impossible not to see that courts of equity have constantly guided themselves by this principle, that wherever the legislature has limited a period for law proceedings, equity will, in analogous cases, consider the *equitable rights* as bound by the same limitation."

The law of courts of equity on this subject, is not become so precise and definite as to admit of clear and definite rules, or of a statement of deductions, by way of rule.

Expressions of eminent judges in courts of equity will show the progress which has been made towards a settled rule; and for that reason more ample extracts have been, and will be given on this head, than are consistent with the general plan of this work.

From the cases it will be collected that the courts of equity have to apply the analogy,

(*h*) 2 Scholes and Lefroy 607.

(*i*) See Cases in page 382.

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1st, Between trustee, and his *cestui que* trust :

2dly, Between mortgagor and mortgagee :

3dly, Between the mortgagor or trustee on the one part ; and on the other part, a person who claims adversely in opposition to the title under which the mortgage was made, or the trust created :

4thly, When all parties admit the title of the mortgagee or trustee ; but there are different claimants of the equity of redemption, or of the benefit of the trust under conflicting titles ; and one of them has an adverse possession.

And courts of equity have to consider the exceptions arising first from fraud ; secondly, from implied trust ; and thirdly, from the disabilities of infancy, coverture, &c.

1st, As between a mere trustee, and his *cestui que* trust, the trustee cannot set up his possession as adverse to that of his *cestui que* trust. The possession is consistent, and not adverse.

Equity will in this case interpose against any attempt of the trustee to protect himself from the performance of the trust.

Thus, in *Hovenden v. Lord Annesley* (*k*), Lord Redesdale observed, that if a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the *cestui que* trust ; and if the only circumstance is, that he does not perform his trust, his

(*k*) *Scholes and Lefroy*, 607.

possession operates nothing as a bar, because his possession is according to his title. This, it is to be remembered, is the language of a judge in a court of equity, defining the rights between a trustee and his *cestui que* trust.

And in his Treatise on Pleadings (*k*), Lord Redesdale has observed,

"Wherever a person comes in by a title opposite to the title to a trust-estate, or comes in under the title to the trust-estate, for a valuable consideration, without fraud, or notice of fraud, or of the trust, a fine and nonclaim may be set up as a bar to the claim of a trust. When a fine and nonclaim are set up as a bar to a claim of a trust, by a person claiming under the same title, it is not sufficient to aver, that at the time the fine was levied the seller of the estate, being seised, or pretending to be seised, conveyed; but it is necessary to aver that the seller was actually seised. It is not indeed requisite to aver, that the seller was seised in fee; an averment that he was seised *ut de libero tenemento*, and being so seised, a fine was levied, will be sufficient.

"But the rule applies only to trustees under declared trusts. When a person becomes a trustee constructively, then the analogy of the statute may be applied (*l*). *Davie v. Beardsham* is a practical application of this doctrine. And

(*k*) Mitford, pl. 203; 2 Freeman 21.

(*l*) 2 Schoales and Lefroy 633.

Lord *Manners* observed (*l*), "That in cases of trusts, and of constructive fraud, equity will regulate its decisions by analogy to the statute of limitations, although it be not bound by it."

And it seems that a fine may bar a *cestui que* trust claiming under a conflicting trust, in opposition to another *cestui que* trust (*m*), who levies the fine.

Thus in *Penvill v. Luscomb* (*n*), the language of Sir *Joseph Jekyll* was, "The statute of fines bars him who has a legal title, if he does not enter within five years; and him who has an equitable title, if he does not bring his bill within five years, which amounts to an entry."

And a *cestui que* trust may, by feoffment or adverse entry, devest the estate of his trustee; and may, by a fine with proclamations directed to that object, bar the trustee by nonclaim. This was admitted by Lord *Hardwicke* (*o*).

Even the title under an attendant term of years may be barred by the *cestui que* trust, when there is clear and distinct evidence that he claimed to hold adversely, and in opposition to the trustee (*p*).

And a trust, arising by implication or construction of law, is confessedly a case in which time may run adversely between the trustee and *cestui que* trust, so as to bar the *cestui que* trust.

(*l*) *Ball and Beatty*, 119.

(*m*) *Basket v. Pierce*, 1 *Vera* 226. (*n*) *Moseley* 72.

(*o*) 1 *Atk.* 591. (*p*) *Froson v. Barnes*, 1 *Vent.* 55.

2dly, As between mortgagor and mortgagee, while that relation continues, and is acknowledged, lapse of time will not be a bar; but from the time the mortgagor or mortgagee begins to hold as owner, then the analogy applies. The mortgagor is bound to pursue his right to redemption within the limited period; and the mortgagee may, subject to the relief afforded by equity, lose his estate in like manner as any other legal owner may lose his legal title, by the bar of the statute of limitation.

The relative situation of the parties however, calls, even at law, for more strict and complete evidence of ouster, disseisin, &c.; and it rarely happens that a mortgagee is barred by fine, since the evidence of his title is preserved by the payment of interest, &c. (p).

The exclusion of the title of a mortgagee is more generally referred to the presumption of payment of the mortgage-money, and a reconveyance of the legal estate.

3dly, In a case of this description, the title is merely legal, and the parties must stand or fall by their legal rights (q). Hence the observation of Lord Alvanley, in *Harmood v. Ogleander* (r), "If the parties are entitled at law they must prevail."

The trustee, on behalf of the *cestui que* trust, or the *cestui que* trust in the name of the

(p) *Fermor's case*, 3 Rep. 77.

(q) 2 Schoales and Lefroy, 70. 626.

(r) 6 Ves. 415.

trustee, must assert the title ; and equity, except in cases of fraud, or of constructive trusts for the benefit of infants, &c. cannot interpose on behalf of the *cestui que* trust ; on the other hand, the person who obtains possession in opposition to the title of the trustee, or mortgagee, as having the legal estate, has no right to relief in equity, to restrain the trustee or mortgagee, or the *cestui que* trust, or the mortgagor, from using and availing himself of any legal remedy, by which the legal title may be re-established. This is the scope and substance of the observations in *Harmood v. Oglander*.

In cases of this sort, the bar, if any, must originate from nonclaim on the legal operation of a fine, or the right and the power of pleading with success some other statute of limitation.

It is a subject over which equity has no direct jurisdiction. The question, if it arise in a court of equity, must be incidentally. It may arise on a question of right to decree specific performance of a contract ; or the right to an account in respect of a rent, &c. In a late case a court of equity compelled a purchaser to accept a title bottomed on the operation of the statute of nonclaim on fines, on evidence showing who was the heir to be barred, and that he was free from disabilities.

In cases thus circumstanced, the bar of the trustee is a bar of the *cestui que* trust ; and the

title is wholly legal, and must be sued on the footing of the right to the legal estate, as between the trustee and the disseisor, &c.

And it was observed by Lord *Manners* (*r*), that the opinion of Sir *Joseph Jekyll*, in *Lechmere v. Lord Carlisle*, "That the forbearance of trustees in not doing what it was their office to have done, shall in no sort prejudice the *cestui que* trusts," if it could apply, which he did not conceive it was intended to do; such a case as this before the court has been often denied, and it is contrary to many decisions. And he continued to observe, "If the trustees who are so appointed, neglect their duty, and suffer an adverse possession of twenty years to be held, I apprehend the statute of limitations is a bar to the *cestui que* trusts. I do not, however, decide this case upon that point; for here the plaintiff, by his bill, calls on a party specifically to execute an agreement under such circumstances, and after such a length of time, that his title cannot be sustained here upon any principle against those who have got the legal interest, accompanied by so long a possession."

In another case (*s*), Lord *Redesdale's* judgment was delivered in these terms: "It is said that courts of equity are not within the statute of limitations. This is true in one respect; they

(*r*) *Ball and Beatty* 68.

(*s*) *Hovenden v. Annesley*, 2 *Scholes and Lefroy* 630.

are not within the words of the statutes, because the words apply to particular legal remedies ; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake, in point of language, to say that courts of equity act merely by *analogy* to the statutes. They act in *obedience* thereto. The statute of limitations, applying itself to certain legal remedies, for recovering the *possession* of lands, for recovering of debts, &c. equity, which in all cases follows the law, *acts on legal titles and legal demands*, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies, nevertheless, in thus administering justice, according to the means afforded by a court of equity, it follows the law.

"The true jurisdiction of courts of equity in such cases is to carry into execution the principles of law, where the modes of remedy afforded by courts of law are not adequate to the purposes of justice to supply a defect in the remedies afforded by courts of law. The law has appointed certain simple modes of proceeding, which are adapted to a great variety of cases ; but there are cases, under peculiar circumstances and qualifications, to which, though the law gives the right, these modes of proceeding do not apply. I do not mean to say, that in the exercise of this jurisdiction courts of equity may not in some instances

have gone too far, though they have been generally more strict in modern times. So courts of law, fancying that they had the means of administering full relief, have sometimes proceeded in cases which were formerly left to courts of equity ; and at one period, this also seems to have been carried too far.

“ I think, therefore, courts of equity are bound to yield obedience to the statute of limitations upon *all legal titles and legal demands*, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity ; for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law ; and therefore it must be taken to have virtually enacted in the same cases a limitation for courts of equity ;” and he cited and commented on the several cases in the note (s).

In all cases in which the application to equity is to remove the impediment to the trial of the title at law, as in the instance of an outstanding term, the limitation of time must depend on the rules of law, and not of equity ; and the

(s) *Smith v. Clay*, Ambl. 645, 3 Bro. C. C. 639 ; *Hollingsworth*, 1 P. W. 742 ; *Lockey v. Lockey*, Prec. in Chancery 518 ; *Weston v. Cartwright*, Sel. Cas. in Ch. 34 ; *South Sea Company v. Wymondsell*, 3 P. W. 143 ; *Bicknell v. Gough*, 3 Ask. 538.

statute must be pleaded at law, and not in equity.

4thly, On this point there are the conflicting opinions of Sir *William Grant* against the bar by time; and of Lord *Hardwicke*, and other judges, for the bar by time. Lord *Hardwicke* held, that the rule against the bar is confined to the cases of a trustee, and *cestui que trust* (*u*).

If in *Cholmondeley v. Clinton* (*t*), the mortgagee had been in the receipt of the rents, instead of the receipt of the *interest*, then, in conformity with all sound principle, the equity of redemption would have belonged to Mrs. *Damer*; supposing the other questions to be in her favour; since under these circumstances the possession of the mortgagee would, in the contemplation of a court of equity, have been the possession of the person really entitled to the equity of redemption; and even an admission by the mortgagee, that one of two claimants was the owner, would not have prejudiced the person in whom the title really resided.

Suppose a person who had made a mortgage in fee of his estate were to devise it by a will not duly attested, and the devisee were to enter and continue in possession of the estate, would not five years nonclaim, upon a fine with proclamations levied by him, bar the heir of mortgagor? It should seem that it would. Indeed

(*t*) 2 *Merrivale* 357.

(*u*) *Supra* 368.

the very point appears in 2 Freeman 18, in a note made in reporting *Salisbury v. Baggott*; for it is there said, "It was held, that an equity of redemption would be barred by a fine, if no claim were made in five years, and that an entry on the land would not serve, because the entry is not lawful; but the party must bring his subpoena, or else he will be barred." Sir Joseph Jekyll seems to have adverted to the same point in *Penvill v. Luscomb* (*u*).

An equity may arise out of fraud; as concealment of title, &c. and equity will not suffer the statute of limitations to run, except from the time at which the fraud is known.

From the knowledge of the fraud the bar in equity begins to run (*x*).

So equity may protect a plaintiff, seeking this right, from being barred by the statute of limitation or nonclaim on a fine, while a bill of discovery is depending, and the defendant is withholding evidence of which the plaintiff is entitled to avail himself (*y*).

Though implied trusts are in general liable to be barred by time, there is an exception to a certain extent in favour of infants.

When a trustee for an infant sleeps on his title, and a stranger enters, he becomes, by construction of a court of equity, liable to account to the infant for the profits.

(*u*) *Moseley* 72. (*x*) 2 *Schoales and Lefroy* 634.

(*y*) *Pincke v. Thornorsoft*, 3 *Bro. C. C.* 328.

During the infancy, the *cestui que* trust will not be barred by the possession of this trustee by construction. But from the period at which the infant shall become adult, he must be active in asserting his title, or he will be liable to be barred by time, in like manner as if he had not been an infant. A case of this sort may change the jurisdiction from a court of law (in which the title of the trustee may be barred) to a court of equity; to have the protection of that court from the legal effect of the statutes of limitation.

And a trust for a class of creditors, as a body, does not impose on them the same duty of diligence as on individuals.

For that reason equity will allow of a greater latitude of time, for the relief of general creditors, from a breach of trust, than it would allow to persons having titles as individual persons.

In cases of infancy, &c. courts of equity, in reference to equities of redemption and of trusts, allow to infants, *femes covert*, &c. the like protection as is afforded to them by the statutes of limitation.

In courts of equity, all rights are considered as *possessory*; and twenty years is, or seems to be the period of limitation; but, as in the instances of infancy, &c. the statute law protects infants, &c. unless ten years can have run against them

since these disabilities cease (*y*). Courts of equity have followed the statute, by adopting into their analogy similar exceptions in favour of persons entitled to the equity of redemption, or trust, and the courts have uniformly allowed of this exception.

Thus, in *Belch v. Haracey* (*z*), Lord Talbot declared it to be his opinion, “ That whereas the court had not in general *thought proper* to exceed twenty years, where there was no disability, a limitation of the first clause of the statute of limitations ; so after the disability removed, the time fixed for prosecuting in the proviso (which is ten years,) ought in like manner to be observed.

In *Corbett v. Barker*, 3 Anstr. 755, it was said, *arguendo*, “ It is clear that a remainderman may redeem during the life of the tenant for life ; and that if he does not, the time runs against him. And a tenant by the courtesy is considered for this purpose in the same light with any other tenant for life. If the tenant for life will not join in redeeming, the remainderman may alone redeem, and then foreclose him ; if neither redeems, the court interferes to prevent the mortgagee from being disturbed after twenty years. *When the time has once begun to run, it is immaterial to him who are the parties entitled, or how the interest is divided,*

(*y*) *Doe v. Jesson*, 6 East 80 ; *Cotterell v. Dutton*, 4 Taun. 826.

(*z*) Mich. 1736, 3 P. W. 288.

nor is the tenancy by the courtesy any bar to it. Several cases were cited, but none of them goes the length of the doctrine.

But it seems that when there are successive estates in the equity of redemption or trust, the owner of each successive estate (*z*) would have twenty years; or in case of disabilities, ten years, after the disabilities ceased, for the assertion of his title.

But with this qualification; that if the time once begin to run, it cannot be enlarged by any subsequent disposition of the owner entitled to the equity or trust; a principle which may be collected from the judgment delivered by C. J. *Mansfield*, in *Goodright v. Forrester* (*a*), and from other authorities (*b*).

These observations are offered with great diffidence; as a step towards a systematic arrangement of this intricate subject. But they are to be received and adopted with great caution; and after a minute investigation of the authorities.

Acquiescence may also be a bar to equitable relief.

But there is not any determinate time which constitutes the bar to relief, under this head of equity. Every case depends on its circumstances, and the degree of inconvenience which would arise from affording relief.

(*z*) *2 Merivale*, 240, *arguendo*.

(*a*) *1 Taunt.* 578.

(*b*) *Page* 386 *a.*

Less than twenty years may be a reason for withholding the assistance of the court.

In one case fifteen years (*b*), and in another case nineteen years (*c*), was deemed an answer to the plaintiff's demand.

This subject was amply discussed in *Cholmondeley v. Clinton*, and most of the cases were cited.

His honor observed (*d*) "All that has been said about acquiescence, either on the part of Lord *Clinton*, or Sir *Lawrence Palk*, seems to be irrelevant in a case where all parties were under the influence of the same common mistake." This part of the judgment is questionable. It was supposed, that knowledge of the facts which constitute the grounds of title, and the admission that the title is in another, call the doctrine of acquiescence into operation. Persons who know the facts must be presumed to know the law arising from the facts.

*Of the relative Characters and Situations of
the Disseisor and Disseisee.*

A Disseisor is a person who acquires a seisin without any title. A necessary effect of a disseisin is to devest the estate of the former owner, and convert it; at first into a right of entry; and, eventually, by a descent which tolls an entry, or by the statute of limitations of

(*b*) *Swanton v. Raven*, 3 Atk. 105. (*c*) 1 *Vesey & B.* 23.
(*d*) 2 *Merrivale* 362.

21 James I. which takes away the entry, into a right of action. But the estate of the disseisor, while it remains subject to a right of entry, may be defeated by the entry of the rightful owner; or by the action of such owner, so long as his remedy by entry or action continues; or the estate may be restored to the rightful owner by remitter.

The right of entry or of action may be barred by the statute of limitations, or by nonclaim on a fine; and it may also be bound or precluded by re-lease, confirmation, and the like acts of the disseisee, or his heirs, or by a warranty.

Whenever, therefore, a title commences by disseisin, or, in other words, without any right, it is important to ascertain that not only the right of entry, but the right of action, has been effectually barred; for while there exists a right of entry or of action in any other person, the title will be defective, unless a re-lease, or extinguishment of the right, shall be obtained.

In old books much curious learning will be found respecting disseisin; and care must be taken to distinguish between actual disseisin and disseisin at election; namely, cases in which a party thinks fit, as against a trespasser, to suppose himself disseised, merely for the sake of taking his remedy by assize, or other real action.

This subject was much discussed in the case of *Doe ex. dem. Taylor v. Horde (e)*.

But the doctrine of Lord *Mansfield* in that case savours of too much refinement to be implicitly adopted, to the extent of the principle on which it was urged.

And in the late case of *Goodright v. Forrester* it was admitted that Lord *Mansfield's* doctrine could not be supported.

In the argument of *Goodright v. Forrester*, and also in a former section which contains extracts from that argument, a general view of the learning of disseisin as applicable to the present times will be found.

Every abatement and intrusion is in effect a disseisin; and whenever a man enters into land without having any title, and claims the fee, or even the freehold, except it be a particular estate divided from the inheritance (*e*), he is necessarily a disseisor. For unless he had a seisin by his entry, his possession could never become rightful by re-lease or confirmation; nor could his title be perfected under the statutes of limitation, or of nonclaim on fines.

But if he enter claiming a *term for years*, or a right to occupy, without asserting any title to the freehold, the real owner may treat him either as a mere trespasser, or as a disseisor, or as a tenant: and if he treat him as a disseisor, there is a disseisin by election; since it is optional with the owner whether he will consider himself as disseised or not (*f*).

(e) 1 Inst. 276 a. 180 b.

(f) *Blandell v. Baugh*, Cro. Car. 302; 1 Inst. 271 a. 56 b.

So if a man receive the rent of my tenant, he does not by that means, *ipso facto*, gain the freehold. But if I think fit to treat him as a disseisor, I am at liberty to do so (*g*).

On the other hand, I may contend that, in point of law, the possession of the tenant is my possession; so that my seisin continues notwithstanding the receipt of the rent by a stranger.

This doctrine is of great importance, and even essential, in considering the effect of a fine, to operate by way of nonclaim; and whether the entry has been taken away by descent. In short, whether the freehold or seisin be in *A* or in *B*, or whether the statute of limitations has operated.

But when a man enters on my tenant, and ousts him, and claims the fee (*h*), this would be an actual ouster of the termor, and also of the reversioner; and consequently a disseisin even against my will, as has already been shown.

But when the person who enters merely claims the term, this entry, though it be an ouster of the termor, will not be a disseisin of the reversioner.

So if there be tenant for life, remainder to me in fee, a disseisin of the tenant for life will be a disseisin of the remainder; with the exception, that when the title to the particular estate is merely in dispute, and the disseisor

(*g*) 1 Inst. 324 b.

(*h*) Litt. § 411.

claims the life estate only, without asserting any title to the inheritance, the remainder-man or reversioner will not be out of the seisin (*i*).

No conveyance by a termor for years, while he continues a termor, will be a disseisin; and therefore if he levy a fine while he is a termor the fine may be avoided by a plea of *partes finis nihil habuerunt* (*ii*).

To gain the freehold in such case, the termor should put an end to his term, and for that purpose, make a feoffment (*k*); for a feoffment is of such forcible operation, that it must necessarily gain the freehold.

As an antidote against the practice of assigning terms to attend the inheritance, and then making a feoffment to acquire the fee, the note to the 2d Vol. of *Conveyancing* (*l*) should be read.

A feoffment should be made by a *cestui que trust*, if for any reason he may wish to devest the legal estate of freehold out of his trustee.

At the same time, it is apprehended that an entry with a declared purpose of disseising the trustee would have that effect. Lord *Hardwicke* (*ll*) admitted there might be such disseisin.

And there are many cases, as the insanity of a trustee, his absence beyond the sea, or the like circumstance, in which it is highly expedient, that a feoffment should be made by the

(*i*) 1 Inst. 276 *a.*

(*ii*) Cruise on Fines 310.

(*k*) 1 Inst. 330 *b.*

(*l*) Preface to 2d Edition.

(*ll*) *Hopkins v. Hopkins*, 1 Atk. 591.

cestui que trust, in order to devest the seisin out of the trustee.

A few general rules may be stated in this place, though their substance will be found in former pages.

1st, The possession of a termor, or of a particular tenant, is the possession of him in the reversion or remainder (*l*). The observation in *Roe v. Elliott* (*m*) is to be read with this qualification, namely, a fine by a person who has a remainder after an estate of freehold, cannot be adverse against those in remainder or reversion, while the freehold continues in the person to whom the freehold belongs (*n*).

But if the remainder-man disseise the freeholder, then a fine afterwards levied may operate against the freeholder. The entry will also devest the estates in remainder or reversion; consequently convert these estates into a right of entry; and the fine may eventually bar them, and render it necessary that an actual entry to avoid the fine should be made prior to the commencement of an action of ejectment; and that one demise in the ejectment should be laid, as on a day subsequent to the entry.

Let it also be remembered, that a fine levied by a person who has a reversion or remainder after an estate of freehold, may be a protection to their common title, under the same seisin;

(*l*) 1 Inst. 324.

(*m*) 1 Selwyn & B. 85.

(*n*) *Gallant's case in Foces v. Salisbury*, Hard. 400, cited

1 Taunt. 596.

and unless it be avoided as a forfeiture, it may be a bar to rights and titles existing at the time of the fine levied, and which might be asserted in opposition to those who have the seisin or estate (*n*).

2dly, If tenant for years be ousted, and the reversioner or remainder-man be disseised, the re-entry of the tenant will also restore the estate of the reversioner or remainder-man, while that estate shall be merely turned into a right of entry; but when it shall be turned into a right of action by a descent, &c. so that the seisin under the reversion or remainder cannot be restored without an action: the re-entry of the termor would in a case so circumstanced be good only *pro interesse suo*.

3dly, No estate can be barred by the operation of a fine, unless it be devested or discontinued at or before the time when the fine is levied, or by the operation of the fine (*o*); and therefore, if *A* be tenant for life, remainder to *B* for life, remainder to *C* in fee, a fine levied by *B* during the life of *A*; and while *A*'s seisin continues, will not, in any event, operate as a bar to the remainder. For the seisin of the tenant for life is the seisin of those in remainder; and as the remainder was not devested or discontinued before the fine was levied, nor by the operation of the fine, the fine, instead of becoming a bar to the estate of

(*n*) Irish Term Rep. 537.

(*o*) Prodg's case, 9 Rep. 104; Seymour' case, 10 Rep. 95.

the remainder-man, constitutes a part of his title ; since whatever act tends to give stability to the particular estate, except a confirmation of that estate alone, tends to strengthen the title of those in remainder (*p*).

The late case of *Roe v. Elliott* (*q*) is law on this principle.

A confirmation of an estate in remainder will of necessity be a confirmation of all the prior estates ; since to defeat the prior estates would be to defeat the seisin which created these estates, and consequently the remainder. This is a rule flowing from principles of tenure, and drawn from the nature and effect of livery, &c. (*r*).

When the fine does not, in the first instance, operate adversely against the remainder-man or reversioner, it cannot eventually become a bar ; and therefore no subsequent adverse possession will give operation to the fine, to be, as against those in remainder or reversion, protected by the fine.

The estate of a disseisor, though originally wrongful, may become rightful by a release of right, from the persons competent to release that right, or by a confirmation, or by an estoppel, which concludes the persons entitled to enter or claim, as a fine levied by a disseisee to a stranger (*s*).

(*p*) *Carhampton v. Carhampton*, Irish Term Rep. 567; *Proctor's case*, 9 Rep. 194; *Goodright v. Jones*, 1 Cruise on Fines, 249. (*q*) *Roe v. Elliott*, Selwyn & B. 85.

(*r*) Litt. § 521.

(*s*) *Buckler's case*, 2 Rep. 55.

And the title which is defective may become complete by a bar to the right of entry or of action of the person in whom the right of entry or of action resides ; as by nonclaim on a fine, by the statute of limitations, &c. or by a warranty ; but under different circumstances of the title, the mode of barring the right of entry or of action will be different. For example : issue in tail cannot be barred, unless by a fine with proclamations, or by a warranty, and not by a warranty, unless such warranty be particularly circumstanced ; for instance, a lineal warranty with assets, or a collateral warranty without assets, by a person who has an estate-tail in possession ; and by a tenant in tail in possession may, it is presumed, be understood a person having a right of entry, or of action, by reason of an entail, which, if not turned into a right of entry or of action, would be an estate-tail in possession.

A disseisor is in all other respects to be considered in the same situation as a rightful owner ; with the difference, that his title is defeasible by the entry, or, according to circumstances, by the action of the rightful proprietor. And a title thus circumstanced should be arranged under two heads, so as to show the state of the title ; first, under the seisin, and secondly, under the right.

And whenever a bar by the statute of limitations, or nonclaim on fines, is relied on, it will not be sufficient to allege that five years

nonclaim on a fine, or twenty years under the statute of *James*, have elapsed.

It must be shown who was the person for the time being entitled to claim, and against whom the statute first began to run, for the purpose of satisfying the purchaser that the person having the right was in a situation to claim when the last proclamation was made; or, if he then laboured under any disabilities, that five years nonclaim on a fine, or ten years adverse possession under the statute of limitations, have run since the disabilities were removed; and when there have been continual and successive disabilities, without any intermission, still the statute of nonclaim will begin to run from the time of the death of the person to whom the right first accrued, or which shall first happen from the time at which the disabilities shall cease (*t*). See the language in the saving clause of the statute of nonclaim on fines, and *Zouch v. Stawell* (*u*).

And when there are particular estates and remainders, the statute will, as already stated, begin to run against each remainder-man, only from the time of the determination of the prior estate; and of course it must be shown when the prior estate determined.

In the statute of Hen. VIII. which limits the remedy by writ of right to sixty years,

(*t*) *Doe v. Jesson*, 6 East 80; *Cotterell v. Dutton*, 4 Taunt. 826.

(*u*) *Plow. Com.* 353.

there is not any saving for infancy, coverture, &c.; so that the statute will begin to run against persons labouring under these disabilities.

Hence it has been concluded, that a title after sixty years adverse possession must necessarily be good. This however is not the case. There may be a remedy to recover an estate in remainder or reversion after prior particular estates in tail after a period however indefinite, as has, in several parts of this work, been already noticed.

A disseisee of every species is the person whose seisin is devested by a disseisin, and he retains the character of a disseisee till his seisin shall be restored by entry, action, or remitter.

Immediately after the disseisin the disseisee has a right of entry.

This right, as has been already noticed, may be converted into a right of action, and such right of action or of entry may be barred by the statute of limitations, by nonclaim on a fine, by release, or even by estoppel.

Though a different opinion is expressed on this point in some books, the authorities favour the conclusion, that a fine levied by a disseisee during the disseisin, and to a stranger, will extinguish the remedy of the disseisee and his heirs by way of estoppel (*u*).

A disseisee has not any devisable interest; (*x*) nor can he grant any estate by way of con-

(*u*) *Buckler's case*, 2 Rep. 55; *Moore's case*, Palm. 365.

(*x*) *Goodright v. Forrester*, 8 East 552.

veyance. He may confirm the estate of the disseisor, or of any person claiming under him by lease or otherwise ; and he may bind his interest by way of estoppel, confirmation, &c. &c. He may release to the terre-tenant in possession, reversion, or remainder (*x*). A re-lease to one of these tenants will be for the benefit of the others, and one of them, or one of two joint-tenants, being in by *title*, may take advantage of a re-lease to the other (*y*).

But a re-lease from a disseisee in fee, as distinguished from a disseisee for life or in tail, (*z*), to one of two disseisors, will operate as an entry and conveyance, and will annex the right or title to the possession, and enable the re-leasee to exclude his companion.

A re-lease has, without much attention to accuracy, been termed the conveyance of a right.

The characters of disseisor and disseisee exist, or rather are applicable only while the disseisin continues in force. For that reason, the better course will be to contrast the different situations in which the disseisor and disseisee stand, in relation to each other, while these denominations apply to these several parties.

1st, The seisin is in the disseisor ; and it is out of the disseisee. The gain of one is the loss of the other : and when there are conflict,

(*x*) Litt. § 455.

(*y*) Litt. § 472. 522.

(*z*) 1 Inst. 275 b. 276 a; 1 Inst. 194 a. b.

ing titles, *seisin* cannot be in two persons when one has a title in opposition to the other.

2dly, During the disseisin, the disseisor may grant a lease to operate on his estate or interest, but a disseisee cannot grant a lease to operate in any other manner than by estoppel; and although he should make a lease, by way of *escrow*, to be fully and finally delivered after he had entered; yet a second delivery after entry would not give effect to a lease which was inoperative at its inception (z).

And after an ouster of a termor for years, and a disseisin of the reversioner, an action of waste will not be maintainable against the termor, since no reversion is existing (a).

A disseisor may make a *charge* by way of grant of annuity, to continue until his title shall be defeated; but a disseisee cannot make a valid charge to take effect, at law, even after his *seisin* shall be restored (b).

A disseisor may be a re-leasee of a right, or of a title of entry from the disseisee, or from any other person, because he has the *seisin* or estate; (bb); but a disseisee cannot be a re-leasee of a rent-charge (c), because he has not any *seisin* or estate in which the rent can be extinguished. It is true, that while he remains tenant to the lord by reason of privity, that is, till the lord has accepted, or the law has given to the

(z) *Jennings v. Bragg*, 2 Rep. 35.

(a) 1 Inst. 356.

(b) Perk. § 65; Litt. § 527.

(bb) Litt. § 455.

(c) Perk. § 594.

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lord a new tenant, the disseisee is capable of a re-leasee from the lord, by way of extinguishment of rent, or services due from him to his lord (*b*).

Again; the disseisor may be a re-leasee either from the lord, from a stranger, or from the disseisee himself; and a re-lease from the lord to the disseisor would put an end to the privity of tenure between the lord and the disseisee, until the disseisin shall be determined (*c*).

In all cases, without exception, the disseisor is the tenant of the freehold; he is the person answerable to the precipice of a stranger; but in no case, nor under any circumstances, is the disseisee the tenant of the freehold, or the person to be sued in a real action. Hence in common recoveries the writ of entry must be brought against the disseisor, and not against the disseisee.

The doctrine of Lord *Mansfield*, in *Taylor v. Horde* (*d*) on this subject, must be read with great distrust. The argument of Mr. *Knowler*, and not the doctrine of Lord *Mansfield*, does, it is apprehended, state the law most correctly.

The learning advanced by the noble Lord has oftentimes been questioned. Lord *Kenyon* never spoke of it with temper. He is well known to have entertained an opinion in direct opposition to that doctrine; and in *Goodright v. Forrester* (*e*) it was distinctly admitted by

(*b*) 1 Inst. 268.

(*c*) 1 Inst. 268.

(*d*) 1 Burr. p. 60.

(*e*) 8 East 552.

the court, though the point is not reported, that the doctrine of Lord *Mansfield* was not tenable.

In consequence of the doubts expressed by Lord *Mansfield*, whether the disseisor became the tenant to the writ of entry, there are many cases in which, under circumstances of great urgency, it may be advisable to make a feoffment preparatory to a common recovery.

Few understood the subject of disseisin better than Mr. *Piggott*; and he considered a disseisor or his alienee as a good tenant to the writ of entry (*f*) ; and it would be difficult for any court to deny that a recovery was duly suffered, if suffered on a writ of entry against the feoffee of a person who held, even for years determinable on his life. The courts would do all in their power to invalidate a recovery suffered under these circumstances ; but the difficulty is for them to find a rule of law under which they can sanction an objection against the recovery. Can they resort to the learning of fraud to impeach the feoffment? To admit that tenant for years may make a feoffment for every purpose, except for qualifying a tenant to a writ of entry for suffering a recovery, would be a singular decision, and a solecism in law!

Again, because the disseisor has the freehold he may endow a woman entitled to dower (*g*) ; but a disseisee cannot endow a woman who is

(*f*) *Piggott Recov.* 40.

(*g*) *Perk.* § 246.

entitled to dower, even as against himself; and yet no act is more favoured in law than endowment, or the perfection of a title to dower (*h*).

Also the wife of a disseisor, being a stranger; or of a lessee at will, or for years, making a feoffment (*i*), may acquire a title of dower by reason of her husband's seisin; defeasible nevertheless under the same circumstances as his estate is defeasible; but a woman, though dowable of a seisin in law; as in the instance of an heir, of whose seisin there is an abatement; or of a remainder-man, or reversioner, on whose seisin there is an intrusion; as well as of a seisin in fact, is not dowable, when her husband has, at the time of her marriage, or afterwards, a mere right or title of entry, as distinguished from a seisin in fact, and from a seisin in law. Thus, if a man marry after he has been disseised; or if an heir marry after an abatement on his seisin; or if a remainder-man, or reversioner, marry after an intrusion, his wife will not be dowable (*k*).

There are a few distinctions on this point deserving of notice; first, a woman is dowable of an actual seisin during the coverture; secondly, she is dowable of a seisin in law, when there is such seisin of the freehold and of the inheritance, *simul et semel*; thus, when lands descend to a man as heir, and he is mar-

(*h*) Perk. § 426. (*i*) Essay on Estates, chap. Dower.

(*k*) 1 Inst. 31 a; Perk. 366.

ried, but a stranger abates on his seisin, and acquires an actual estate; or if a man is married, and seised of a reversion or remainder, and he has a right of entry by reason of the determination of particular estates, but he is disseised by the intrusion of a stranger, in each of these instances the wife will be dowable. The ground seems to be that she ought not to suffer for the *laches* of her husband; but, under the like circumstances, a husband would not be tenant by the courtesy of the seisin of his wife; and even a woman, if not dowable when her husband has been disseised before the coverture, and consequently before the title of dower was *inchoate*; and even though the husband has a seisin during the coverture, expectant on an estate of freehold, either for life or in tail; yet a disseisin of the particular tenant, and as a consequence of the reversioner or remainderman, would prevent the attachment of a title of dower; since it would exclude the husband even from a seisin in law of the immediate freehold; for there cannot be a title of dower without a seisin, either in fact or in law, of the freehold and of the inheritance, at one and the same time.

As the disseisor obtains the seisin of the land, he may give seisin of a rent-charge to a person entitled to the rent (*l*).

But as the disseesee has not any seisin of the land, he cannot give seisin of the rent (*m*). Nor

(*l*) *Breddymans case*, 6 Rep. 58 a.

(*m*) *Ibid.*

can a tenant for years give seisin of a rent-charge by the payment of that rent.

And though a disseisor and disseisee should join in a feoffment, or in a lease, such feoffment or lease would be considered as the feoffment or lease of the disseisor (*n*).

But if the disseisee had entered while his entry was lawful, and prior to the feoffment or to the lease, then the feoffment or the lease would have proceeded from him.

And even though a man should enter on his own tenant for life, and disseise him, he would acquire a new estate under a new title, and not retain his old seisin or estate; and therefore could not grant his reversion by that name (*o*); and if he had been tenant in tail he would not have effected a discontinuance, because he was not seised by force of the entail (*p*).

Finally the seisin or estate of a disseisor is assets descendible to his heir.

But a right or title of entry of a disseisee will not be assets in the hands of his heir until the seisin shall be restored (*q*).

These observations are equally applicable to the person who is the disseisor or disseisee, under each species of disseisin, except so far as there may be a difference, arising from a relation or privity between the very lord and very tenant.

Under the doctrine derived from the feudal system, the lord is not obliged to accept the

(*n*) 1 Inst. 218; Perk. § 57. 218; Litt. § 476.

(*o*) Hob. 323.

(*p*) Litt. § 637.

(*q*) 6 Rep. 58.

disseisor as his tenant; for the lord has the option of considering the disseisor or disseisee as answerable for his services (*r*). Hence it follows that until the lord has accepted the disseisor as tenant, he may claim the benefit of an escheat on the death of the disseisee without heirs (*s*). After the lord has once accepted the disseisor for his tenant, the privity ceases between the lord and the disseisee, and the lord is precluded from claiming the benefit of an escheat on the failure of heirs of the disseisee during the disseisin.

It is also observable, that the alienee of a disseisor necessarily becomes tenant to the lord, since he takes under a feudal contract.

And the heir of a disseisor becomes tenant to the lord, even against the lord's will.

A few additional observations will supply all that is material on the relative situations of these persons.

1st, The disseisor is in the seisin; he may devise by will; and it seems to be law, that a right or title of entry or of action is not devisable; and therefore a disseisee cannot make a disposition by will. The point was so decided in *Goodright* and *Forrester* (*t*); but in the exchequer chamber this point was not considered to be so clear as it seems to have merited. However the Chief Justice left the former judgment in full force.

(*r*) Litt. § 454; 1 Inst. 268.

(*s*) 1 Inst. 268; Litt. § 454.

(*t*) 8 East 552.

There is an uniform concurrence of authorities, that a will by a person who is seised will be revoked by a disseisin, and not called into operation, unless the seisin shall be restored in the life-time of the testator (*u*).

Is it not then absurd, that a disseisin after a will duly made, should take from the will its operation? and yet a man who is disseised should, while he is a disseisee, be able to make a valid will?

The learning of estoppels, though discussed in a former part of this volume, properly belongs to this division; since, for the most part, it is applicable to acts proceeding from a person who is out of the seisin.

It must be admitted, and it has been shown, that this doctrine takes a large range. It is relevant to assurances proceeding from an heir apparent, an heir presumptive, or even a stranger.

An estoppel, it will be remembered, is in effect a conclusion on a man to aver the truth in pleading or in evidence. A protestation may be defined to be an exclusion of a conclusion. (*x*). In short, its object is to guard against an estoppel.

The general principle of the learning of estoppel is founded on the ground that a man shall not defeat his own act, or deny its validity: for example; if a deed is prepared for a man,

(*u*) *Bunker v. Cook*, Salk. 237; *Gibb. Dev.* 126.

(*x*) 1 Inst. 124.

who is called John, while his name is William, and he executes the deed in the name of John, he is precluded from avoiding the deed, by averring that his name is William ; but had he executed the deed by his proper name he would have been at liberty to have avoided the deed, as not being his bond, his grant, &c.

So when a man does, in his deed, recite particular facts, these facts become evidence against him ; and he will not be at liberty to deny the truth of this statement. But the learning of estoppel takes a much larger scope ; and to understand it with any degree of accuracy, it will be proper to consider the law on this subject as applicable to feoffments, fines, recoveries, deeds of demise, and deeds of grant.

First, as to feoffments. From the solemnity with which a feoffment is made, and still more, from its necessary operation to carry the fee-simple, it puts the feoffee into the seisin, and the feoffor will never be at liberty to avail himself of a title acquired subsequent to the feoffment. This was one of the many advantages which were derived from a feoffment ; and in favour of feoffments, it may be said it excels a fine or recovery ; since it clears all disseisins, abatements, intrusions, and other wrongful estates, *when the feoffor may lawfully enter.*

It is quite clear that a stranger, or a tenant at will, or tenant for years, may make a valid feoffment ; and this feoffment will be good as against him, though not against his heirs, in

respect of any estate which may subsequently devolve on him. So if an heir apparent, or heir presumptive, should make a feoffment in the life-time of his ancestor, and after become heir, the feoffment would be an estoppel against his assertion of title; and for this purpose, a feoffment, by an heir apparent, or by an heir presumptive, or by a man who afterwards purchases for a valuable consideration, stands on the same footing.

Secondly, As to fines and common recoveries. All the observations made on feoffments are applicable to assurances by these matters of record. There is one circumstance, however, in which they differ, viz. although the fine or the recovery might operate in the nature of a grant, and not of a feoffment, in other words, might operate without passing the immediate freehold, still it would produce the effect of an estoppel; and this estoppel binds the heir as well as the parties.

Thirdly, as to demises. The distinction is between demises by indenture, and demises without indenture. That there may be an estoppel, there must be a demise by deed indented, and even between indentures of demise on the one hand, and feoffments, fines and recoveries on the other hand, there is a marked difference. An indenture of demise can never operate as an estoppel to any extent, when it can operate as a lease, in point of interest, for any part of the term: for example; if a tenant

for life lease for one thousand years, this lease will determine with his death, under the rule *cessante statu primitivo cessat derivativas*; and no subsequent acquisition by descent or by purchase will, in a court of law, give extension or continuance to the lease.

When a court of equity interposes and affords relief, it bottoms the relief on the ground of contract, and compels the party to give effect to his contract by a new lease.

But if a man, not having any estate in the land, grant a lease for ten, twenty, or more years, and afterwards acquire the fee-simple, or any other estate, this estate will feed the estoppel; and the lease will have effect on the ownership thus acquired.

Fourthly, mere grants by deeds of estates of freehold, with or without indenture, and whether they are to operate by way of grant, re-lease, or of confirmation, will not, in a court of law, amount to an estoppel. For example; a grant by a man, who is an heir apparent, or heir presumptive, or by a man who has a mere right or title of entry, or of action, in consequence of disseisin; will not have any effect at law, although the heir or the devisee should afterwards becomes actually seised; and a surrender of copyhold lands always operates by way of grant; and not tortiously, or by way of wrong. Hence the division of conveyances into those assurances which are rightful, and those which are wrongful. Those which are rightful are thus

distinguished, because they never pass more than the party may rightfully convey ; as distinguished from feoffments, fines, and common recoveries, which, on many occasions, operate wrongfully, by discontinuing or barring estates, which are not in the grantor.

Sometimes a fine is levied, or recovery is suffered, by a person who has been disseised while he is out of the seisin ; and sometimes such fine is levied, or recovery suffered, by a person in the seisin, and at other times by a mere stranger.

A fine, or common recovery, levied to the person in the seisin, will operate by way of release of right, in confirmation of the title ; and when the fine is levied, or recovery suffered to a mere stranger (*y*), it will benefit the person in the seisin. This benefit arises under the learning of estoppel.

The conusee in the fine, or the recoveror in the recovery, cannot take any benefit from the fine, or from the recovery, because it is incompetent to the grantor in the fine or recovery to transfer his right of entry or of action ; and the person who has the seisin may take advantage of the fine or recovery to estop the grantor in the fine or recovery and his heirs, from claiming the land contrary or in opposition to the fine or recovery.

In these observations, it is assumed, that the fine or recovery imports a grant of the fee ;

(y) *Buckler's case*, 2 Rep. 55.

for there is a material difference in law between a fine *sur concesserunt* for years, and a fine which imports to be a grant of the fee. A fine for years will merely bind the right when it shall descend, or the seisin when it shall be restored, or an estate when it shall be acquired; while a fine which imports to grant a fee, will altogether intercept the title, and preclude the right of taking by descent, or enforcing the right or title of entry.

These observations on the learning of estoppel are drawn from the principles of the common law. The subject, with the cases, will be found in a former division, written to supply a supposed omission, which did not exist, in the original MS.

A large and copious class of cases, relevant to the situation of tenant in tail, and his issue, and arising out of the construction of the statutes of Hen. VII. and Hen. VIII. properly belongs to those divisions in which the effects of fines with proclamations, proceeding from tenant in tail, have been considered.

What descents take away the entry.

A descent to take away entry must be of an estate of inheritance, either in fee or in tail; and not of an estate of freehold to heirs as special occupants (z).

It must be to the *heir instanter*; for if the heir be *en ventre sa mere* at the death of the

(z) 1 Inst. 239 a.

ancestor, the heir will not be protected. This is an anomaly in law.

It must be to heirs, and not to the successors of a sole or aggregate corporation.

It must be of the inheritance, as conferring the immediate freehold ; and not of the inheritance in reversion or remainder after an estate of freehold.

A descent from the immediate disseisor will not take away an entry unless he has been in the seisin for five years.

But a descent from his alienee, or even from the heir of the disseisor, will take away the entry, although the disseisin was within five years ; except that an *heir* who was a party to the disseisin, will not be protected against his own wrong ; and therefore an heir so circumstanced will be subject to entry.

When an action may be brought.

An action may be brought when there is a discontinuance by the alienation of tenant in tail, or the right of entry is taken away by warranty, by the statute of limitations, or by a descent which tolls an entry.

When there is a discontinuance by tenant in tail, the issue have no right of action during the life of the tenant in tail, nor even after his death, if they are barred by a fine with proclamations, or by nonclaim on a fine, or by the statute of limitations of 21 James I. c. 16. or by warranty ; and the persons in reversion or remainder

cannot maintain an action until there shall be a failure of issue inheritable under the entail; and the determination of the right of enjoyment under any estate prior to that of the defendant in the action.

Some discontinuances are only partial, while others are of the fee ; in other words, some discontinuances have a limit, and will cease, while others have no limit, and will not cease without some intervening circumstance.

For example ; a tenant in tail may lease for the life of *B*, or may make a gift in tail.

Should this lease or gift determine in his life-time, the discontinuance would cease (*a*).

On the other hand, the discontinuance may be enlarged ; and therefore, if after a discontinuance for life, the reversion should be granted for life, in tail, or in fee, and this estate should come into possession in the life of tenant in tail (*b*), the discontinuance would continue notwithstanding the determination of the estate which originally caused the discontinuance.

So a discontinuance may be created or enlarged by reason of a re-lease with warranty (*c*).

What remitter shall restore the seisin.

When there is a right of entry the seisin will be restored by an actual entry, or even by a lease, gift, or conveyance, which confers the

(*a*) 1 Inst. 333 a.

(*b*) 1 Inst. 333 b.

(*c*) 1 Inst. 332. 328.

right to enter; for the lessee, &c. will be supposed by law to have the seisin under the old right, rather than a new estate under a defective title, which is in opposition to his right.

But then the lessee must not be bound by estoppel, to insist on his ancient title.

So when there is a right of action, if the immediate freehold be by act of law, or otherwise, cast on the person who has the right to the freehold, and that right be remediable, there will be a remitter to the old seisin or estate; so that the party will be seised by force of the ancient ownership; and a remitter to a person who has a particular estate, will be a remitter to all persons who have a right to estates in reversion or remainder: with these exceptions; a right of entry, will not serve those who have merely a right of action; and a remitter to the freehold will not necessarily restore the estates of those who have merely a right of entry.

Within what time a right of entry or of action must be prosecuted.

This subject is discussed in a former page. It will be obvious to the reader that the original arrangement did not provide for the division now under discussion.

By what means a right may be extinguished.

A right may be extinguished in the whole, or in part by,

1st, Re-lease:

2dly, Confirmation:

3dly, By the statutes of limitation, or non-claim on fines.

4thly, For a time by warranty, since warranty is a defence, *pro tempore*, against the heir; and not a bar to those who may eventually have the right, and not unite in themselves the characters of heirs (*d*).

Of the means by which an estate which was wrongful may become rightful; and the means by which an estate, which was defeasible, may become absolute.

Immediately after disseisin, the disseisee has a right of entry or of action; and he may be restored to the seisin by an actual entry (*e*); or by judgment and *execution* in a real action, by continual claim; namely, by going on the land, or as near to the land, as may be within every year and day (*a*), and claiming the land as his freehold, or as his inheritance, &c. A claim near the land without any actual entry, will suffice for the party, if he cannot make an actual entry from reasonable fear of personal injury; also by the determination of a particular estate, which was the cause of the disseisin or discontinuance, before the disseisin has been enlarged (*b*); and lastly by remitter.

Sometimes, as by descents which toll entries, or by warranty, the right of entry may be

(*d*) Litt. § 602, 603.

(*e*) Ibid. § 415. *Goodtitle v. Riordan*, 9 Vin. Abr. Disseisin, M. pl. 6.

(*a*) Litt. § 414.

(*b*) 1 Inst. 256 a.

changed into a mere right of action; and when an estate-tail is discontinued, the remedy for restoring the seisin is by action, and not by entry.

A right of action cannot become a seisin without either, first, judgment and execution, or, secondly, remitter; or a wrongful entry, namely, a disseisin by the person having the right, and a re-lease to him.

There is a difference, as already observed, between a right of entry converted into a right of action; and a right of action, as a consequence of a tortious alienation by tenant in tail.

The right of entry is always a present and immediate right; and so is the right of action arising from a right of entry, converted into a right of action; because, in all these instances, there is either a wrongful possession, or there is a wrongful alienation in breach of the feudal contract, and which has occasioned a forfeiture; but when a tenant in tail discontinues, no forfeiture is committed.

The alienee will be entitled to hold the possession, and retain the seisin, until that period or event shall arrive, at which the issue in tail, the reversioner or remainder-man, would have had the right of entry, in case no discontinuance had been effected (*b*).

In *Goodtitle v. Risdan*, it was held, that confession of lease, entry, and ouster, was evidence

(*b*) *Vin. Abr. Disseisin*, N. pl. 6.

of *seisin*. But that doctrine is founded on a principle in opposition to *Littleton*, that the denial of title is a *new disseisin*.

Whoever may wish to trace this subject through all its niceties and varieties; in short, whoever wishes to become a well-informed lawyer on titles, must read those chapters in *Coke Litt. (c)* which treat of descents which take away entry; continual claim; discontinuance; remitter; re-lease; confirmation; and warranty.

In a secondary sense, an estate which was wrongful will become rightful, when it is discharged from the right by the statute of limitations, or by the statute of nonclaim on fines.

In a more proper sense, and in the signification usually adopted, an estate which was wrongful cannot become rightful by any other means than a *re-lease of the right*, or a *confirmation* of the title of the disseisor, or of his heir, or alienee, by the disseisee or his heir. And an estate which was defeasible by a condition, will not be absolute until the condition shall have been performed, or dispensed with, or have become impossible; or there shall be a release of the condition, or a re-lease or confirmation of the right or title; or of the land; producing the effect of discharging or extinguishing the condition, and enabling the party who is in the *seisin* to hold absolutely, and free from the condition.

When there is a title to the possession,

(c) *Litt. chap. Continual Claim.*

a re-lease to one of two joint-tenants, for example, to one of the alienses of two disseisors, or one of two alienees of a tenant for life, the re-lease will operate for the benefit of both joint-tenants; but a re-lease to one of two persons, being disseisors by wrongful entry only, will give the title and the right to the re-leasee in exclusion of his companion (*d*). This re-lease operates by way of entry and feoffment.

The progress of a title may be thus stated:

Whoever has a seisin in fact or in law, may lawfully enter at the time appointed for the commencement of his estate in possession, and may convey or alien, while he has an estate in possession, reversion, or remainder.

A person who is disseised may, at all times, enter until the right of entry be barred, either by a descent, which takes away the entry, or by the statute of limitations, or by nonclaim on a fine, or by some act proceeding from the disseisee himself, as a re-lease of right, confirmation, &c. of title, which precludes his right of entry. He cannot convey or alien to a stranger.

When an ancestor may enter, and dies, the right of entry will descend to his heir at law as representing him; or it may be transferred by operation of law to the assignees, under a commission of bankrupt (*e*). But no instance can be found in which a right of entry or of action can be transferred from a man to the

(*d*) 1 Inst. 275. b. (*e*) *Smith v. Coffin*, 2 H. Black: 44.

devisee of his will; for a right of entry or of action is not, for the purposes of alienation by will, a right in the nature of a possibility coupled with an interest; although a contingent remainder, or an executory devise, is of that description; since contingent remainders and executory devises flow from the present existing seisin, and depend on it, and are, in substance and effect, part of the same seisin; while rights of entry and of action depend on a title which has been deprived of the seisin.

These observations are applied to rights of entry by reason of estates which were of a freehold quality. A man may be dispossessed of a term; and while ousted he will have merely a right of entry.

This right of entry is not assignable by deed, but it is transmissible to executors or administrators, as representing the person to whom the right belonged; and from principle, it should seem to flow, that any directions contained in a will of the rightful owner concerning his interest in these leasehold estates, would be binding on the executor or administrator, and by that means give effect to a legacy or gift of the property by the will, after the property shall be recovered, and the assent of the executor or administrator to the gift shall be obtained.

When a right of entry no longer exists, an entry by the rightful owner will be wrongful, and will be a disseisin to the person who has

obtained the right of possession (*f*). And therefore, if the disseesee, after his right of entry shall be taken away, or his heir enter on the disseesee, or his alienee, and obtain the possession, there will be a new disseisin; and the possession may be recovered by the disseisor or his alienee, in an ejectment, or by a writ of assize. *Littleton*, as already cited, is fully in point.

But if the person thus recently disseised should bring a writ of right, and join the *mise*, on the mere right, the rightful owner, the original disseesee, or his heir, would succeed; since the *mere right* is in the original owner or his heir; although the first disseisor, or his heir, or alienee, may have obtained the right of possession, as distinguished from the right of property, or the *mere right*.

With these observations this important and highly useful head of seisin and disseisin will be closed.

Of Titles under Heirs.

As often as a title is derived within a period of modern date, from a person as heir, the fact that such person was heir should be ascertained.

And in all instances of title depending on descents, except the fact be well known by the purchaser, or by those who act on his behalf,

(*f*) *Supra.*

there should be evidence in support of the pedigree. This evidence should be such as would be proper to be given to a jury, in the event, that the title should be litigated.

This is more particularly important when the title is derived from a remote ancestor; and the pedigree is to be traced through a variety of persons.

But when a title depends on a descent which took place at a remote period, as thirty years or upwards, to a person who then claimed as heir, and has been in receipt of the rents, or had an uninterrupted possession of the lands through the intermediate period, this circumstance affords a fair and reasonable presumption that the person who claimed as heir was heir, and supersedes, except under special circumstances, the necessity of further investigation.

On the other hand, when the title is questioned, or there is even a rumour of a claimant, it is particularly important to investigate the pedigree minutely and accurately; and to obtain full evidence of the real state of the title. The evidence should be such as to enable the purchaser to maintain the title in a writ of right; or other adverse proceeding which the title may admit.

In considering the title of an heir, it must be kept in mind that he must not only be *heir to the person*; he also must be *heir to the estate*.

In short, he must be *heir to the person last seised, and of the blood of the first purchaser*.

The steps to be taken are, to ascertain, first, the person who was the purchaser; and secondly, the person who was last seised of the estate to which a title is to be made by descent.

To understand this subject fully, with all the various distinctions of which this learning is susceptible, *Blackstone's* chapter on Descents in his Commentaries should be perused, and the invaluable Essay of Mr. *Watkins* on Descents, (an Essay which deserves the student's most serious attention) should be studied with particular care.

The rules or corollaries of descent should be treasured in the mind, as they must, on all occasions, influence the judgment, and lead to the most material conclusions. These rules are,

1st, Inheritances shall *lineally descend* to the issue of the person last actually seised in *infinity*, but shall *never lineally ascend*; that is, a father, mother, or other lineal ancestor, as such, shall never succeed to a descendant; but a lineal ancestor may succeed in the character of a *cousin*.

2dly, The male issue shall be entitled before the female.

3dly, With the exception of gavelkind lands, in which the sons succeed together as coparceners; and of borough-English lands, in which the youngest son is preferred, and other customary lands, in which the course of descent is prescribed by the custom; the rule is, where there are two or more *males in equal degree*,

the *eldest* male shall inherit, but the *females shall inherit altogether.*

4thly, Lineal descendants, *in infinitum*, of any person deceased, shall *represent* their ancestor; that is, shall stand in the same place as the person himself would have done had he been living.

5thly, On failure of lineal descendants or issue of the person last seised, the inheritance shall descend to *the blood of the first purchaser*, subject to the three preceding rules.

6thly, The collateral heir of the person last seised must, (except as to estates-tail) be his *next collateral kinsman of the whole blood*; hence the rule *seisina facit stipitem*; and hence the rule or expression, *possessio fratris, de fædo simplici facit sororem esse haeredem*, viz. excludes the brother of the half-blood. Thus, the person claiming to be heir in the collateral line to an estate in fee, not being an estate-tail, must be,

1st, The next collateral kinsman.

2dly, Of the whole blood to the person last seised; or if these never was an actual seisin, then to the first purchaser, though he never was seised.

3dly, Of the blood of the first purchaser.

4thly, In *collateral inheritances*, the male stock of the first purchaser shall be preferred to the females; that is, kindred derived from the blood of the male ancestors of the first purchaser, shall be admitted into the succession

before those of the blood of the female ancestor to the first purchaser.

These rules lead to the investigation of,
1st, Who shall be deemed the first purchaser :
2dly, Who shall be deemed the person last actually seised.

As to the first purchaser, the person to whom the inheritance is first given or conveyed, either by will, or by any other assurance, is deemed the first purchaser.

Every person who takes by purchase, as distinguished from escheat, and from descent, is the first purchaser of the estate ; for example : If *A* be seised in fee, and by his will devises to *B* (not being his heir) in fee, *B* is the purchasing ancestor.

So if a feoffment or any other conveyance be made by *A* to *B* in fee, or to uses under which the fee is limited to *B*, absolutely or in contingency, *B* will be the first purchaser, though his interest first vests in the heir.

Also when a gift is made to *A* in tail, *A* is the first purchaser of the estate-tail ; and if he suffer a common recovery, and by that mean enlarge his estate-tail into a fee-simple, and uses are declared of the recovery, either immediately or ultimately in favour of *A* ; or if the use result to him in fee, he will be deemed the first purchaser of the fee-simple ; not merely because the fee is first limited to him, but because he was the first purchaser of the estate-tail ; and the use derived from the estate-tail

will partake of the same descendible qualities in regard to the first purchaser, as the estate-tail, if it had been an estate in fee, would have done.

So if a reversion or remainder in fee be granted to *A*; or limited to the use of *A*, not being the former owner; *A* will be deemed the first purchaser of the inheritance.

But there are acts by which the course of descent may be changed; for instance, if *A* seised in fee, *ex parte materna*, convey to *B* in fee, and *B* re-convey to *A* in fee; or if *A* being seised in fee, *ex parte materna*, levy a fine, *sur grant et render*, and thereby the fee is granted to *B*, who renders it to *A* in fee; in each of these cases there is a conveyance and re-conveyance; a grant and re-grant; and the course of descent will be changed; and *A* will become the first purchaser.

So if a man seised in fee, *ex parte materna*, convey to the use of himself in tail, or in trust for himself in tail, he will be deemed the purchaser of this estate-tail; and if he afterwards suffer a common recovery to the use of himself in fee, this fee will descend from him, as the first purchaser; for this estate in fee depends for its title on the estate-tail, and will descend from the first purchaser of that estate.

But if a man seised in fee or in tail by descent, *ex parte materna*, convey to the use of or in trust for himself in fee, either immediately, or after and expectant on several par-

ticular estates; or if the use or the trust of the fee result to him by implication of law; this use or trust will have the same descendible qualities, as the estate, out of which it is derived would have had; and will descend to the heirs of the first purchaser of the estate on which the title depends.

This rule is derived from the doctrine of courts of equity, which, as to uses and trusts, constituting part of the old ownership, preferred the heir to the estate under the former ownership.

So equities of redemption on mortgages in fee will belong to the *heir to the estate* of the mortgagor, and not to the heir of the person to whom by name the equity is reserved.

This rule of equity accomplishes by direct means that which the common law accomplished more circuitously.

By the common law, when a man seised *ex parte materna* conveyed in fee, subject to a condition, and died, the heir to the person of the grantor could alone take advantage of the condition.

But after this heir had reduced the estate by his entry or claim, *the heir to the estate*, in other words, the maternal heir, might enter upon him (*g*).

But this doctrine has been questioned (*h*). It certainly is an anomaly, and a departure from first principles.

(*g*) 1 Inst. 12 b. 57 a.

(*h*) Robinson on Gavelkind, Book 1, chap. 6, p. 121.

So if there be an erroneous judgment against a man in a real action, the heir to the estate, and not the heir to the person, must prosecute the writ of error.

However, the reason on which *Robinson* objects to the doctrine in *Coke Litt.* 12 b. is not quite satisfactory. In the case he quotes from 1 Inst. 215 a, the customary heir takes advantage of the condition in right of a reversion in him, since it is a condition annexed to an estate for years, and not a condition annexed to a grant of the fee.

The strongest case which can be objected to the doctrine of Lord *Coke* in 1 Inst. 12, is, that the heir to the estate, in other words the heir *ex parte materna*, can alone maintain a writ of error.

Sometimes the descent may be changed even by a devise to the heir.

On this subject there are several distinctions.

1st, The general rule is, that a devise of *the fee* generally, and without any limitation over, to a person who solely is the heir, is void; since the devise gives to him the same estate as he would have taken by descent, and the law deems a title in him by descent to be his better title. Besides the gift is *actum agere*, and would, in respect of many privileges, prejudice the heir, if it intercepted his title as heir.

But the general rule applies only when the property is limited to the heir in fee; and for the same extent of interest as he would have taken by descent; therefore,

1750: 8 & 9 M.

Nicholas

1751: 10 May.—
Years,
Rich, redeemable.John T.
Trustee
1st and
Remainder1758: 10 Oct.—
13 Oct.—
intestate.
tained Administration
Court.1760: 1 Dec.—
atrix to1768: 10 June.—
John Pinson
to attend.1768: 12 & 13
Humphreys

Father

Father,

Son, fee

1768: Trin. Terri-
Son young

1768: July 10.—

1769: June 1.—

1770: Oct. 10.—

1779: 10 July.—
4 Daugh-
and H.

(Share.

MARENCHE HOGG.
anent of original 1/4 on
ife,

THOS. EDGE, Heir

His Wife dowable,

1817: 1 June.—
a fine for
to prevent of 1/41817: 10 June.—
MA joined with herTHOMAS EDGE
Bankrupt.1818: 18 April.—
gain and SaleK. L. } Assignees
M. N. }
O. P. }Lease, Release, and
ons, conveyed to the
trust for C. D. in fee.Equitable:
D. died intestate.

E. F. Heir.

†(C) 1770: Oct. 10.—3,000 years,
Demise to Timothy Brent.

1779: 1 April.—He died intestate.

John Hix, Administrator,
from Court of Bishop of W.1782: 10 Feb.—Administrator assigned to
Richard Kenchant.

1781: 7 Dec.—Will of Kenchant.

A. B. }
C. D. } Executors.
E. F.E. F. survived; he had proved in
Canterbury.

Executors of E. F. are

G. H.

J. K.

both dead. | Survivor died intestate.

1790: Letters of Administration de bonis
non to Y. Z.1791: 1 June.—Y. Z. assigned to X. Y.
to attend.

(4.)—JOANNA's Share.

JOANNA,
Living, and unmarried.6 1/4 Sept.—She demised
this 1/4 to L. M. for
2,000 years, in mort-
gage for £. 2,000 and
interest. 1/3 of 1/4
No act done.



2dly, Under a devise to the heir in tail he will take the estate-tail by purchase ; but even if the ultimate fee be limited to him generally, he will take this fee by descent.

So if a devise be to the person who is the heir, and to his heirs, subject to an executory devise in favour of a stranger, the heir will take an estate of a different quality, from that which would have descended to him, and for that reason, according to the better opinion, will take by purchase (*i*).

The contrary seems to have been ruled in *Hind v. Lyon* (*k*). Mr. *Watkins* has adopted the opinion in *Hind v. Lyon*; but, upon the best consideration, *Scott v. Scott* ought to be followed, not only as the more recent determination, but as founded on a principle which fully supports it, namely, that the estate taken by the heir is different in its quantity and its quality from the estate which would have descended.

It is different in its quantity, because on its first limitation it is bounded by the event by which it may be determined ; and secondly, it is different in its quality, since it is defeasible, or determinable, instead of being absolute.

So a devise in fee to one of several co-heirs will change the course of descent, and make the devisee the first purchaser (*l*).

(*i*) *Scott v. Scott*, Ambl. 383; *Eden's Rep.* 458. This point is under the consideration of the King's Bench, Easter Term, 1818, and stands for judgment.

(*k*) 3 *Leon.* 64.

(*l*) *Watkin's Descents*, 225, 2d edition.

This consequence is necessary to exclude the other co-heir from taking any share.

So if a devise be to *several co-heirs*, either as joint-tenants or tenants in common in fee, they will take by purchase, and not by descent, since the quality of their estate is changed (*m*). In one case, they must take in joint-tenancy, and in the other case in common, instead of taking in coparcenary.

So if a devise be to the *heir and a stranger*, as *joint-tenants* in fee, the heir will take as a purchaser on account of the joint-tenancy.

But if a devise be to the heir and a stranger, as *tenants in common* in fee, the heir will, it is apprehended, take his share by descent.

There is not any decision on this point; but such was the opinion of Mr. *Fearne* (*n*), and this opinion is adopted by Mr. *Watkins* in his Treatise on Descents (*o*).

At first it may seem that this conclusion is in opposition to the law, that two coparceners to whom lands are devised as tenants in common in fee shall take by purchase. The cases are very different: for in that case, if the daughters took by descent, they would be seised *per my et per tout*, so that neither would have a share to herself; but each share would be held by the co-heirs in coparcenary, instead of being held as a distinct share, and a distinct tene-

(*m*) Litt. § 254; *Watkin's Descents*, 223.

(*n*) *Post. Works*, 130.

(*o*) *Watkin's Descents*, 2d edition, p. 270.

ment. This reasoning does not apply to a sole heir taking a particular share exclusively; for as to him and the other devisee, it is the same as if this share had not been devised, since in the absence of a devise to the heir, the heir and the devisee of a moiety would be tenants in common.

It must not, however, be forgotten, that there are some cases in which a coparcener may take the entirety of the lands, and yet hold them by descent.

Thus, on a partition between coparceners, each coparcener will hold the lands allotted for him as a parcener, and consequently by descent (*p*); and even a rent granted for equality of partition will be descendible in the same manner as the land was descendible (*q*).

So on a descent to parceners by custom, one of them may be excluded by reason of advancement, and by refusal to bring the advancement into hotchpot; and the remaining parcener may take the remaining lands, although an entirety in the character of heir, and by descent.

The authorities which illustrate this subject are to be found in *Coke Litt.* chap. Parceners, and Parceners by Custom.

When the feudal tenures prevailed, and reliefs, and other burthens of tenure were severely felt, there was a great anxiety on the

(*p*) 1 Inst. 169 b.

(*q*) Ibid.

part of tenants to prevent the descent to the heir, and the consequent burthens of tenure.

To guard against the various contrivances adopted to avoid the right of the lord to his fines, &c. we owe the rules,

1st, That a man cannot grant to his heirs, or heirs of his body, *eo nomine*, so as to make them purchasers (*r*) :

2dly, The rule in *Shelley's* case, that whenever in the same deed or will there are several gifts, either by way of limitation under the rules of the common law, or by way of use, or by way of trust; one to the ancestor for his life, and the other to his heirs generally; or to his heirs male or female, as heirs of his body; either generally or specially, the gift to the heir or heirs of the body shall form part of the gift to the ancestor; and on his death the heirs, or heirs of the body, shall take by way of descent, and not as purchasers.

This rule equally applies, whether the several limitations are mediate or immediate; but it is necessary that the several limitations should give interests of the same quality, either both legal, or both equitable; and that the heirs should be described with an intention that they should take in their character of heirs, and not by way of designation of particular persons; and that the several limitations should be in the same deed or instrument, or in component

parts of the same instrument ; for example : in a *codicil*, as part of a will ; or in an appointment, exercising a power in another deed (*s*).

This rule of law admits of a great variety of distinctions, and of many anomalies and exceptions. It has invited a large portion of professional attention.

To understand this rule, and all its distinctions, the student should, in the first place, read those authors who have treated the subject in the most summary way. He should advance step by step into the discussion with those authors who have taken a more full, minute, and complete investigation of the subject.

The order to be recommended is to read,

1st, The observations of Mr. *Watkins* on this rule in his Treatise on Descents (*t*) :

2dly, The succinct view of the rule in *Shelley's* case :

3dly, Mr. *Hargrave's* view of the rule, as given in his juridical arguments, and in his note on *Coke Litt.* :

4thly, Mr. *Butler's* note on this rule :

5thly, Mr. *Fearne's* elaborate and comprehensive view of the rule ; as part of his work on contingent remainders.

It remains only to observe, that in copyhold lands, if the ultimate fee be limited to the use

(*s*) *Venables v. Morris*, 7 Term Rep. 438 ; but see View of the Rule in *Shelley's* case,

(*t*) Page 159.

of the former owner, or to his right heirs, though this be not strictly an use of equitable jurisdiction, he will retain his old estate; and of course it will be descendible from the first purchaser of that estate (*u*).

So if tenant in tail by descent, *ex parte materna*, suffer a common recovery of the copyhold lands, and the lands are re-surrendered to him in fee, this fee, according to the last decision, will be descendible to his heirs, *ex parte materna*, and not from him as the first purchaser (*x*).

But there are some propositions in the case of *Roe v. Baldwere* (*y*) which are rather singular. According to the doctrine of that case, if tenant in tail by descent from the maternal ancestor suffer a recovery, and declare the use to himself in fee, the estate will descend to the heirs *ex parte materna*, whether the lands be of copyhold or freehold tenure.

This, no doubt, is true as to freehold lands, because the use is, as to them, governed by rules which prevailed in courts of equity prior to the statute of uses.

But as to copyhold lands, the recoveror must be admitted, and after he is admitted, he surrenders to the use of the former tenant in tail and his heirs, and this surrender is a common law conveyance, and the former tenant in tail

(*u*) *Roe dem. Noden v. Griffiths*, J. Black. Rep. 605.

(*x*) *Roe dem. Crowe v. Baldwere*, 5 Term Rep. 104.

(*y*) *Ibid.*

takes by the rules of the common law, without regard to the doctrine of uses, or any rule adopted by courts of equity.

This case, therefore, was, in argument, very accurately compared to a feoffment and re-enfeoffment; and although Lord *Kenyon* observed in *Roe v. Baldw^re*, that this case has been ingeniously argued on the forms of a recovery, and it has been compared, as to the copyholds, to the case of a feoffment and re-enfeoffment, yet this is by no means like the case of a feoffment and re-enfeoffment, and we cannot enter into these forms. They are, perhaps, inexplicable, but they must be taken as a mere mode of conveyance by a tenant in tail, and ought so to be considered in all respects; and that it was so considered by the court in *Martin v. Strachan*. He added, that without wasting time in going through the doctrine laid down by Lord C. J. *Lee*, in that case, he thought they were bound to adopt the authority of it, and to apply it to *both* these species of property.

With great deference, however, this opinion seems to have been too hastily formed; and is a proof that the most learned judges may be surprised into error. It is impossible, on principle, to distinguish the case of a recovery of copyhold lands, with a subsequent surrender to the former tenant in tail, from the case of a feoffment and re-enfeoffment. Both cases stand on the same footing; and Lord *Kenyon*'s obser-

vations destroy the distinctions formerly taken, and universally adopted on this point. They make every case bend to the authority of *Martin v. Strachan*, under circumstances to which that case has, in principle, no application. They suffer a rule of equity to prevail over a rule of law, in a case in which equity never had any jurisdiction, either before or since the statute of uses.

And it may be safely said, that it never was in the contemplation of the court by which *Martin v. Strachan* was decided, to question the authority upon which the effect of a feoffment and re-enfeoffment, or a fine, *sur grant et render*, is grounded.

The reason of the cases in which the fee taken under a resulting use, or under a resulting trust, or under an express declaration of use ; or under an express declaration of trust in favour of the former owner ; will descend from the first purchaser under the former ownership, depends altogether on the rules applied by courts of equity, anterior to the statute of uses ; and which, in reference to uses, after the statute, were embodied into the law, by the express provisions and enactments of the statute of uses ; namely, that the estate arising from the use should be of the same quality with the use.

When a man seised in fee, *ex parte materna*, had conveyed to the use of himself in fee, and died seised of the use, a court of equity con-

sidered the use or beneficial ownership to belong to the person who would have been heir to the legal seisin, in case the legal seisin had remained with the former owner (z). Thus the maternal heir, or other heir of the person by whom a conveyance had been made to the use of himself in fee, would, on a bill for an execution of the use or trust, by a re-conveyance, have been preferred to the heir of the person who had made the conveyance. In other words, the heir *to the seisin*, and not the general heir, or *heir to the person*, was considered to be entitled, on the ground, that, in equity, the ownership was not substantially changed. On this principle trusts and equities of redemption do at this day follow the same course of descent as would have governed the legal estate, if that estate had remained with the grantor or mortgagor.

The rule of law, however, when unconnected with and independent of the statute of uses, totally disregards the former ownership. It merely respects the seisin as derived under the last conveyance, and considers the last grantee of the fee as the first purchaser, and as taking *feodum novum ut antiquum*, and not an estate descendible from a former ancestor, who, in point of fact, had been originally, and in the first instance, the person to whose acquisition the family were indebted for the property.

(z) See *Abbot v. Burton*, 11 Mod. Rep. 181.

To preserve a preference to the heir on the part of the first beneficial owner of the family, the estate, after a conveyance upon trust, or a mortgage in fee, which becomes forfeited, must be kept within the jurisdiction of a court of equity, so that the descent may be governed by the rules of that court.

From the moment the equitable ownership is changed into a legal estate, the title is withdrawn from the influence of equitable rules, and is governed by the rules of law; and under these rules the last grantee of the fee is deemed the first purchaser (*a*). Hence, after a conveyance from the mortgagee in fee to the mortgagor, or his heir; or after a grant by a fine, *sur grant et render*, which is, in its effect, a conveyance and re-conveyance; or after a feoffment and re-enfeoffment; or any other conveyance, producing the effect of a grant and re-grant, the course of descent will be changed; since it is in a court of law, and not in a court of equity, that any question of right between the different classes of heirs must be decided (*b*).

To apply these observations to the case of *Roe v. Baldwere* (*c*): Had the parties left the legal estate in the defendant in the recovery, the equitable ownership would have been governed by the principles of courts of equity; and the heir to the seisin, as it existed, antecedent to the recovery would have been pre-

(*a*) *Dougl.* 771.

(*b*) *Goodright v. Wells.*

(*c*) 5 *Term Rep.* 104.

ferred to the general heir of the vouchee in the recovery ; with the exception only that the heir of the purchasing ancestor, and not the heir under the entail, is the heir for whom inquiry must be made in investigating the title.

But when the defendant had surrendered to the use of the vouchee, the vouchee had acquired the legal estate under a new seisin or title. He was the first purchaser of that estate ; and, consistently with principle, the heir on the part of his father, and not the heir on the part of his mother, or other purchaser of the estate-tail, ought to have prevailed. This was the opinion of the gentlemen most conversant with subjects of this nature.

From the high character of Lord Kenyon, and on the rule *stare decisis*, it is more likely that *Roe v. Baldwre* will be followed in future adjudications, than that it will be over-ruled. But the evident departure from principle, and a fear lest this case should be used as a precedent for other cases, not the same in circumstances, or in terms, seemed to call for these observations; though the general plan of this work is to avoid a detailed discussion of questionable points. At all events, the observations will be useful, as illustrating the difference of the rules, which govern the law of descents in courts of equity, and those which govern descents in courts of law.

As to the person last seised :

In all cases of immediate descent from the first purchaser, the first purchaser is considered as the person last seised, whether he had an estate in possession, reversion, or remainder; and whether he had an actual possession or seisin, or not; and whether he had an estate, or merely a contingent or executory interest.

As to persons claiming by mesne descent, a distinction must be made between lands held in possession, and lands held in remainder or reversion, after an estate for years, or after a particular estate of freehold, as for life or in tail.

On the death of each ancestor, his heir becomes the owner, and, *ipso facto*, by the descent, he has a seisin in law.

This seisin does not make him a stock or ancestor, unless he obtain an actual seisin; and if the lands are held for an estate in possession, he cannot obtain an actual seisin, unless he, or some one by his commandment, or subsequent assent, or the guardian in chivalry, in socage, or by nurture on his behalf, or some person to whom he leases the lands, actually enters into them; or he changes the state of the title by making a conveyance or lease, &c., and thus acquires a new reversion (*a*).

And it remains to be seen what shall be deemed an actual seisin, under the different circumstances of the descent of an estate of

(*a*) *J. Watkins* 64; 1 Inst. 15 a; *Doe v. Keen*, 7 Term Rep. 386.

inheritance, subject to a prior term of years, or a prior particular estate of freehold.

And first as to the seisin of the inheritance, subject to a prior term for years.

The possession of the termor is the possession of the owner of the reversion or remainder. It gives an actual seisin as distinguished from a seisin at law (*b*); as livery to a termor for years vests the seisin in the grantee of the remainder for life, in tail, or in fee.

So the possession of a guardian, either by knight-service, in socage (*c*), or by nurture (*d*), or of a copyholder, or of a tenant at will (*e*), [but *qu.* as to tenant by sufferance, *ibid.*] will give an actual seisin as distinguished from a seisin at law, and make a *possessio fratris*, in other words, the stock of a new succession.

But if a man has an estate in fee, mediately or immediately expectant on an estate for life or in tail, in himself (*f*), or a stranger, and the fee descends from him to his heir, and the heir dies intestate, without having acquired an actual seisin of this remainder or reversion in fee; the *heir to the person* last seised, viz. the ancestor of the mesne heir, shall be entitled by descent.

But an actual seisin may be gained of this reversion or remainder by several means:

(*b*) 1 Inst. 15 a.

(*c*) Ibid.

(*d*) *Newman v. Newman*, 2 Wilson 516.

(*e*) *Hale's Notes to 1 Inst. 15 a.*

(*f*) 1 Inst. 281 a; *Watk. Descents* 151.

It was at one time supposed that an actual seisin might be gained by receiving rent reserved on the estate for life or in tail. The point has been decided different ways. According to Lord Coke (*g*), there would be an actual seisin by receiving the rent. But according to Lord Hale, in his notes, it has been adjudged, and the law seems to be, that in such case, seisin of rent does not make *possessio fratris*.

1st, An actual seisin may be gained of such reversion or remainder, by making a lease, and thus acquiring a new reversion, or (for so the law seems, though no authority for the point has been found,) by making a conveyance to uses, so that the fee is taken back by express limitation or resulting use, under his own act or conveyance.

2dly, An actual seisin may be acquired by the determination of the prior particular estates of freehold, and obtaining actual possession, and, as a consequence, seisin, either by the heir himself, or by his tenant or guardian, or any other person on his behalf.

It is to be remembered, that an actual seisin once acquired may be defeated under a prior title; and if such seisin be defeated in the lifetime of the heir, then as far as such seisin is defeated, the title must be deduced from the ancestor last seised, and not from the heir whose seisin was thus defeated.

For example; *A* dies seised, and *B* is his

(*g. b. 1 Inst. 15 a.*)

heir, and the heir obtains an actual seisin ; but this seisin is defeated, as to a third part, by the endowment of a woman entitled to dower.

As to this one third part, the law considers the mesne heir, in the same state as if he never had obtained an actual seisin.

On this point it may also be observed, that if the heir had died seised his heir would have been entitled ; and a subsequent endowment would not have disturbed his title as heir.

The rule *dos de dote peti non debet*, with its distinctions, flows from the same principle.

So if the immediate heir had made a lease for life, and the lessee had endowed the widow, this endowment would not have defeated the seisin of the heir, because the heir had acquired an actual seisin ; and the reversion was changed and altered by the lease for life ; and the reversion had become expectant on a new estate for life (*h*) ; in other words, there was a change in the reversion.

And there are some interests of which an actual seisin cannot be acquired, as contingent remainders. But each heir for the time being is so far the owner that he may devise or release.

It is not sufficient that the party is stated in the deed to be, or to have been, the heir, except in cases in which the possession has been held for a long series of years, on the footing of the title of the heir.

(*h*) 1 Inst. 152.

In a case of recent descent, the state of the pedigree should be authenticated by certificates of marriage, baptism, &c. or by affidavits of persons acquainted with the family.

This is more particularly proper when the heir is a collateral relation, and the descent is from a remote ancestor ; and every case must be governed by its own circumstances, and the probability that the person who asserts his ownership as heir, is the person in whom that character is, or was, fulfilled.

It sometimes happens that no heir on the part of the father can be found ; and the maternal heir claims an estate of which the person last seised, was the purchaser.

Titles of this sort, till protected by a long possession, or by a fine with proclamations, &c. &c. should be viewed with great jealousy ; investigated with great care ; and finally accepted with more than ordinary caution, by requiring indemnities, &c. when they can be obtained ; for though the possession may be held, under a title made out *prima facie* by the maternal heir ; yet, with the exception of particular cases, in which the extinction of the inheritable blood of the father can be traced, as a consequence of alienage, bastardy, or the like, it is highly probable, and almost certain, that there does exist a more immediate heir, although from the obscurity of the family, such heir cannot be traced.

In many instances also, the investigation is

not made, as extensively as it might and ought to be ; for although there may be an extinction of the inheritable blood on the part of the father or grandfather of the person last seised, or of the first purchaser ; it by no means follows that the heir on the part of his mother is entitled to succeed.

According to the canons of descent, as propounded by *Blackstone*, there must be a failure of the collateral relations on the side of the father, including the maternal ancestors, before an heir on the part of the mother of the person last seised, can establish a title in himself. It is to be lamented that this rule is not fixed by a decision. Within a few years a case was agitated, which, if it had not been compromised, would have led to a decision of this point.

In tracing a pedigree of collateral descent from a first purchaser, the course to be pursued under the canons, and their illustration, as propounded by *Blackstone*, is,

1st, To find the father, and then to inquire for his collateral relations :

2dly, On their failure to inquire for a grandfather, and his collateral relations ; and so on proceeding to the person next in degree of proximity.

Having gone to the utmost extent to which the paternal line can be traced, the *third step* is to find the mother of the *most remote* paternal ancestor, and to inquire for her collaterals ; and on their failure, to proceed in an inverse order, coming down at last to the collaterals of the

mother of the father of the person last seised ; and on failure of that line only can the collaterals on the part of the mother of the person last seised be admitted.

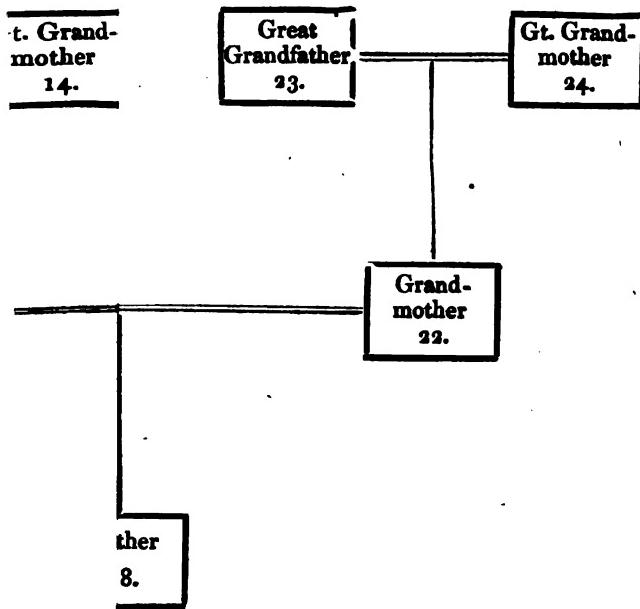
The simple table which is annexed will, in the most effectual manner, elucidate these observations ; taking the figures as denoting the order or priority of succession in which the collateral relations of the persons designated by the several figures, will be entitled to take, a *feudum novum*, descending *ut antiquum*, after a failure of descendants of the first purchaser.

It is also to be remembered, that no one can succeed as heir, unless he be of *the blood* of the first purchaser, as well as heir of the whole blood to the person last seised ; consequently, in all cases in which any other person than the person last seised, was, in point of law, the first purchaser, the pedigree is narrowed, and circumscribed, by excluding all persons except those who are connected in blood, with the person who was the first purchaser ; therefore, when the father was the first purchaser, all persons, as far as they must claim as being of the blood of the mother only, either in the descending or collateral line, will be excluded.

But it may happen that the same person may be related, at the same time, by the blood of the father, and also by the blood of the mother ; and may be entitled, as being of the blood of the father, though excluded as being of the blood of the mother.

In successions in the collateral line, half-

To face p. 446..





blood never can exist in any other branch of the pedigree than that which traces the pedigree of the person last seised from the common ancestor: all descendants from any other person in the line of succession must be of the whole blood to the person last seised; since they are descendants from two persons being the common ancestors. Pedigrees frequently become unnecessarily complicated, from disregarding these distinctions.

And with respect to the rule *possessio fratris facit sororem esse hæredem*, it is also to be observed, that the mere circumstance that a person is of the half-blood to the person last seised, will not exclude him from taking as heir, if he be of the whole blood to those ancestors through whom the descent is to be derived by *representation*.

Thus, suppose two first cousins to intermarry, and to have issue *F*. The father *D* also had issue *G* by another wife, and *F*, being the first purchaser, dies seised: *G* could never take as the paternal heir of *F*, because he is of the half-blood to *F*; but he can take as *maternal heir* to *F*, because, with reference to *E*, the maternal ancestor, *D*, and consequently *F* his son, he derives his pedigree from two persons who were the common ancestors of *E*.

Thus, in tracing the pedigree from *E*, *G* is considered as of the whole blood of *E*, and therefore of *F*, although with reference to a descent from *F*, as first purchaser, or in the

paternal line, in right of representation of the father as father, distinguished from being *cousin of E*, he is not of the whole blood to *F*.

Instead, therefore, of propounding the rule to be, that the heir must be of the whole blood of the person last seised, it would be more correct to say, that he must be of the whole blood to, that is, descended from, those two parents, whether father and mother, or grandfather and grandmother, or other ancestors in an higher degree, who are the common link or *vinculum* in the pedigree. The apparent difficulty of the case which has been stated, arises from the circumstance that *G* claims and takes as *cousin*, and not as brother, to *F*. One of those discussions, which take place between young gentlemen studying the law, and shortly afterwards a case of actual practice, led to this criticism. In short, general rules frequently mislead students from the universality of their terms; and it is only by a critical examination of the reason of the rule, that the exception can be discovered.

The proposition that a father cannot be heir to his child, is another instance which leads to a similar discussion. The father may be heir to his child, as his *cousin*, though he never could be his heir, as his *parent*.

To examine this point: In the second volume of his *Commentaries*, (p. 13) the learned *Blackstone* has a passage in these words: "In

" personal estates the father may succeed to his " children; in landed property he can never " be their heir, *by any the remotest possibility.*" By this passage it must be understood, that the *father* cannot succeed to his *son* merely in *the character and relation of father.* In any other sense, it is not by any means accurate to say the father cannot, "*by any the remotest possibility,*" succeed to the son as his *immediate heir.* The intention of *Blackstone* evidently was to admit, that which, certainly, is true, that the father, though he cannot be heir to the son, merely as his father, yet, eventually, may become *heir to the estate;* and after a descent to *any collateral kinsman*, may succeed as the *heir to that person.* It also seems to have been his intention to have denied that there was any possible means by which the father could succeed as *immediate heir* to his son, by *any the remotest possibility.* A contrary doctrine however is clearly established. It has been held that *the father may be immediate heir not only to the estate of his son, but to his son, as the second cousin of the son.* For as the father would be entitled to be heir, as *cousin* to the son, if he did not sustain the relation of father, he is not excluded merely on the ground that he is the father. In searching for the heir of the son, the father, considered merely as the father, must be passed over as not inheritable; on the other hand, he is to be allowed the right of a *cousin* and *collateral kinsman*, when he can claim in that character, for

quum duo jura in uno persona concurrunt, æquum est ac si essent in diversis. Thus he is to be considered in a double point of view; first, as a father, secondly, as a cousin. Suppose then two cousins to intermarry, and that there is issue of that marriage a son, who purchases lands and dies: in inquiring for the heir to the son, it is a decisive objection against a claim of the father, that he is the father; as often as the question is, whether he shall be preferred to the uncle or great uncle of the son, on the part of his father. But let the paternal line fail, and then recourse must be had to the maternal line. In that line the father may succeed as a cousin to his son, thus:

A, a bastard, has two sons, *B* and *C*; *B* has a son *D*; *C* has a daughter *E*; these two children intermarry and have issue *F*, who purchases lands, and dies without issue. In this case *D*, the father, *B* the grandfather, and *A* the great grandfather, as the paternal ancestors of *F* in the direct ascending line, are to be excluded from the succession. *C* therefore, if living, as the paternal great uncle, or *E* his daughter, as the paternal cousin in right of her representation of *C*, and notwithstanding she is the mother of *F*, may succeed to his estate. But suppose *C* and *E* to be dead without issue, then *B*, as the brother of *C*; and if *B* be dead, then *D* his son may succeed; the former as brother, the latter as nephew to *C*; in other

words, as the *cousin and maternal heir of F the son*. In this case, *F* is supposed to have been the purchaser; and the observations show that both his father and mother, as his cousins, are in the line of succession to him, and capable of being his heirs in the collateral line of their relationship. From the circumstance, that the son is the purchaser, arises the conclusion, that the mother stands preferable in the line of succession to the father. The same would be the case if the lands had been purchased by *D* the father, *B* the grandfather, or *A* the great grandfather of *F* in the paternal line. On the other hand, suppose *E* the mother, or *C* her father, as the maternal grandfather of *F*, to have been the purchaser, then *B* the paternal grandfather, and in right of him, *D* the father of *F*, would be preferred to *C* and *E*.

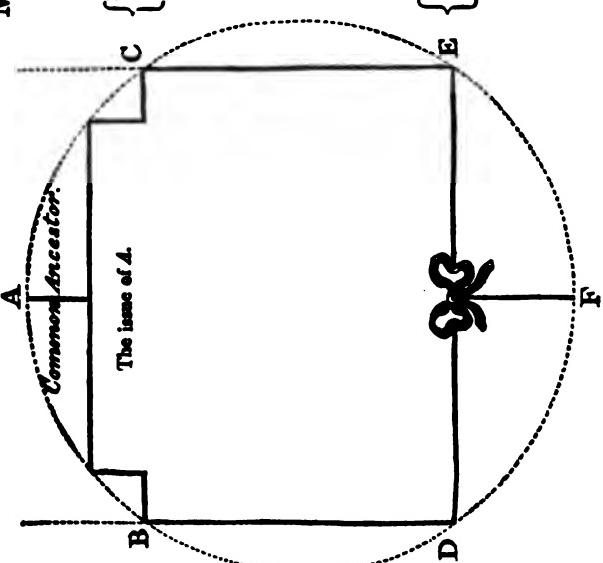
The situation of these persons may be represented by a circle, in this form :

Paternal Line

Common ancestor.

Son of A, also the father of D, and the grandfather, and also the maternal great uncle of F.

Maternal Line.



Son of A, also the father of E, and the grandfather, and also the paternal great uncle of F.

The mother, and also the second cousin of F.
being the first cousin of D, the father of F.

The father, and also second cousin of F,
being the first cousin of E, the mother of F.

To find the paternal heir of *F* the purchaser, the circle must be searched from the left to the right, beginning with *D* the father, and ending with *E* the mother, as cousin to her son. By supposing *C* and *E* to be dead without issue, there will be a failure of the heirs of *F* on the part of his father, though his father, or his paternal grandfather be living. Recourse must therefore be had to the *maternal* line. To find the heir in this line, the reverse of the circle must be taken, and then *B*, if living is the first inheritable person as the brother of *C*; and if *B* be dead, then *D* the father of *F*, as his second cousin, will, in right of his representation of *B*, be the immediate heir of *F*.

The difficulty, if any, in understanding these positions, will be removed by considering that the father will succeed to the son as *his cousin and heir in the maternal line*, and not as his father. The like observation applies to the mother when she is *inheritable*, for she takes as heir in the *paternal* line.

Experience also suggests the caution, that in cases of recent descent care should be taken that the descent has not been interrupted by any testamentary disposition.

Hence the practice of requiring evidence to raise the presumption, that the last owner, and when there have been intermediate descents, each mesne heir, has died intestate as to the lands in question.

In deducing a title under trustees, this caution

is not observed so frequently, as the importance of the case deserves.

To satisfy a purchaser of intestacy, the will of each successive owner or trustee, if there be any will, should be produced; that the effect of such will on the title may be considered; and as often as it is alleged that each intermediate owner, or trustee, died intestate, then letters of administration should be produced; or if, as it sometimes happens, it is alleged that the party had not any property, and therefore no administration has been taken, there should be a search for a will in the ecclesiastical courts of the several ordinaries, to whom the right of granting the administration of the assets, if any, would have belonged; namely, the prerogative court, the court of the diocesan, and of the archdeacon, or other person having local or peculiar jurisdiction. To take letters of administration for this direct purpose, is of no use, except to induce the belief of intestacy from the oath which is taken; and an affidavit would equally answer that purpose.

On occasions, however, of pedigree, as in all other instances, a discretion must be exercised. It should be governed by circumstances; and the caution will vary with the character of the persons with whom the purchaser is dealing. In proportion as they are illiterate, ignorant, or dishonest, in the same proportion the industry of the purchaser should be exerted, to ascertain the real state of the title.

Much also depends on the character and reputation of the solicitors, who are concerned for the family; and the probability there is of any fraud having been practised; or of any misrepresentation having been made; or of any information being withheld.

Sometimes this inquiry is extended even to a period of a century.

This, however, is carrying the caution beyond the bounds of prudence; with the exception of those cases in which there is a reference to a will, and the nature of the case, and the circumstances of the title may render it expedient to ascertain whether an estate-tail, with special limitations in strict settlement, might not have been created by such will; or there is, from a common recovery appearing on the abstract, some ground to suspect an entail; and there is a chance of tracing such entail by a search for the will of a given person.

Such searches for wills of persons who were the owners at distant periods is more particularly necessary, when the possession has been held by the same person, or by the same family, for a long series of years; as sixty years or upwards.

In one instance the lands had been held for eighty years by the same person; and after great reluctance, the will of her brother was produced; and though it had been alleged that he had died intestate, it turned out that the present owner was tenant in tail under his will.

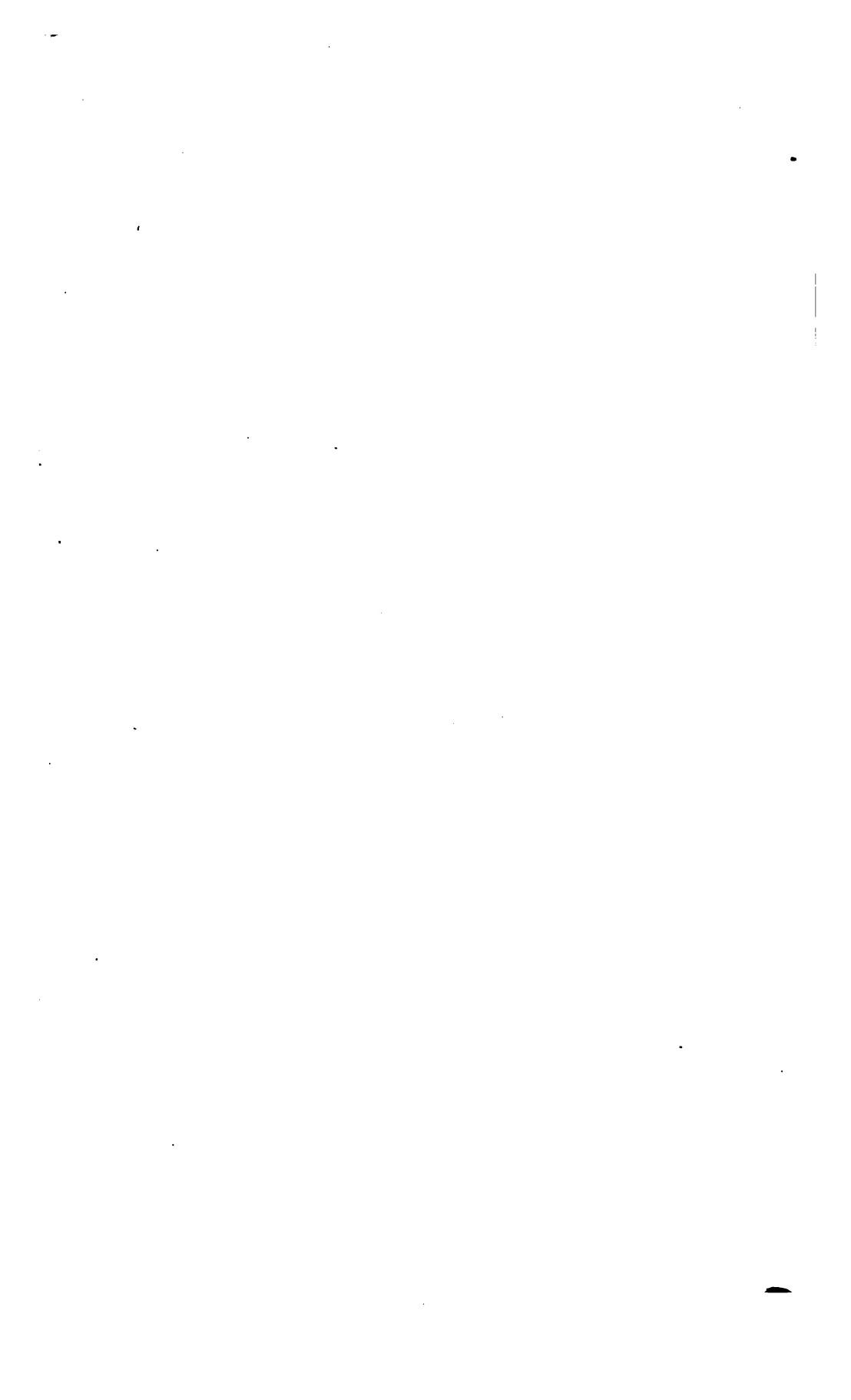
These and the like instances suggest cautions which often subject the conveyancer to the imputation of giving unnecessary trouble, and of being the author of delay and expense !!

And in this place it may be observed, that those titles are most eligible in which there has been a frequent change of property from one family to another, and the chain of evidence is carried on by a connected series of purchase deeds, settlements, or wills, &c.

As an exception to the general rule, that the property must be derived from the first purchaser, it is to be noticed, that when easements, or rights of way, or rights of common, are made appendant to land, the accessory will follow the principal; and the heir to the land, though he be a maternal heir, will be entitled to the easement, &c. though purchased by a person who has left a paternal heir.

Lands which escheat descend with, and as parcel of the manor, in right of which the escheat takes place.

END OF THE SECOND VOLUME.





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